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OPERATING DIFFERENTIAL SUBSIDY BUY-OUT

HEARING

BEFORE THE

SUBCOMMITTEE ON MERCHANT MARINE

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

OPERATING DIFFERENTIAL SUBSIDY BUY-OUT

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OPERATING DIFFERENTIAL SUBSIDY BUY-OUT

THURSDAY, JUNE 28, 1984

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on Merchant Marine,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room SD-138, Dirksen Building, Hon. Ted Stevens (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: David Dye, staff counsel, and John D. Hardy, minority staff counsel.

OPENING STATEMENT BY SENATOR INOUYE

Senator Inouye [presiding]. The hearing will please come to order.

The chairman of the subcommittee is unable to be with us at this moment. He has responsibilities in the Chamber.

I wish to thank the distinguished Senator of the subcommittee, the gentleman from Alaska, for scheduling this hearing to examine the consequences of using any surplus in the operating differential subsidy [ODS] account for alternative purposes. ODS is one of the cornerstones of U.S. maritime promotional policy. It is part of a comprehensive statutory scheme to promote all segments of the U.S. merchant fleet, maritime labor, and our shipyards.

The statutory scheme also attempts to assure that those operators receiving ODS do not as a consequence have an unfair competitive advantage over unsubsidized U.S. operators in our foreign trades and operators in our domestic trades. Despite MarAd's projections that it will require budget authority of $377 million to liquidate the ODS obligations that will accrue during fiscal 1985, there is a real possibility that during the course of the fiscal year MarAd may find itself with a surplus of ODS funds.

This will occur if there is a carryover from fiscal years 1983 and 1984 of an existing $101 million in ODS contract liquidation authority, and the amount of idleness in the subsidized fleet during fiscal 1985 is greater than anticipated when MarAd calculated the $377 million.

In the event that MarAd does find itself with a substantial ODS surplus, there is a real possibility that such surplus might be used for purposes other than meeting its current ODS obligations. For example, those funds could be used to first buy out some long-term ODS contracts which run into the mid to late 1990's, and second, to finance re-engining of existing U.S.-flag vessels.

Worthwhile as these or other uses of ODS surplus funds might be, I believe they would raise substantial questions, such as whether MarAd would be spending money for purposes other than for which Congress appropriated it, and therefore require additional budget authority.

Whether MarAd has the administrative authority to curtail or basically change a statutory program.

Finally what effect curtailment or change in direction of the ODS Program might have on the overall complex and balanced promotional scheme embodied in the Merchant Marine after 1936, as amended.

For all these reasons during full committee markup of MarAd's appropriation I sought to insert report language to reaffirm that the $377 million being appropriated to liquidate ODS obligations incurred in fiscal 1985 be used specifically for that purpose.

The distinguished chairman of the subcommittee requested that I not do so because he intended to hold these hearings to examine the possible alternative use of any surplus in the ODS account. Therefore, we are meeting this morning.

OPENING STATEMENT BY SENATOR STEVENS

Senator STEVENS [presiding.] This morning the Merchant Marine Subcommittee will examine several issues relating to the Operating Differential Subsidy (ODS) program which is administered by the Maritime Administration (MarAd). These issues include potential amendment or termination and settlement of present subsidy contracts, alternative use of carryover funds, and other related issues.

Operating Differential Subsidy is paid to U.S. companies to offset the lower ship operating costs of foreign-flag competitors. Direct subsidies were first provided to American liner operators by the Merchant Marine Act of 1936. The Act was expanded in 1970 to include bulk carrier ships under the ODS program.

In 1982, MarAd amended its ODS contract with a large U.S. liner company to provide subsidy for a larger number of that company's ships, but for a considerably shorter period of time than had been stipulated in the original contract. Subsequently, another liner company has filed an application for a phased termination of its ODS contract with the government in exchange for receiving a substantial portion of its full contract price on an accelerated basis. Still, another operator has applied of an immediate termination of its contract in exchange for a substantial settlement.

MarAd has not acted on either of these applications. In October, 1983, MarAd published proposed guidelines for ODS amendments and terminations. There has been no final action on these guidelines. Nonetheless, there has been an active debate within the industry concerning the legal basis for such amendments or terminations, the proper role of Congress in this process, and the policy implications of such action. These questions are also of considerable interest to the Congress, and this Subcommittee in particular.

Our first witness is Mr. Garrett E. Brown, Jr., Chief Counsel of the Maritime Administration, Department of Transportation. Mr. Brown.

STATEMENT OF GARRETT E. BROWN, JR., CHIEF COUNSEL, MARITIME ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

Mr. BROWN. Senator, it is a pleasure to appear before you this morning. My name is Garrett Brown, and I am Chief Counsel of the Maritime Administration, Department of Transportation. I appreciate the opportunity to take part in this oversight hearing on so-called operating differential subsidy of contract termination.

At the start, I would like to distinguish between what we refer to as an ODS termination agreement and an ODS contract amendment. An ODS termination agreement is an agreement between an ODS contractor and the Maritime Administration to terminate an existing ODS contract in return for certain settlement payments by the Government, and for certain agreed on non-ODS obligations to be rendered by the contractor.

An ODS termination agreement is not to be confused with what we refer to as an ODS contract amendment. An amendment may provide for a significantly earlier termination than provided in the existing agreement with ODS payments being made only for the services actually performed.

The Secretary clearly does have statutory authority to enter into such ODS contract amendments, and did so in the case of U.S. Lines. In that transaction, ODS was paid for the subsidized operation of an increased number of U.S.-flag vessels, but only for a 5-year period, so that there was a net saving to the Government.

Such an ODS contract amendment does not constitute an ODS termination agreement. With respect to ODS termination agreements, I would like to comment briefly upon the two applications which are currently on file with the Maritime Administration, one of them from Delta Steamship Lines, and the other one from Lykes Brothers Steamship Lines.

The application for an ODS termination agreement by Delta proposes that the Secretary agree to pay Delta $525 million in six payments over the next 5 years. The payments would be in settlement of the Government's long-term obligations under ODS agreements that run through 1995 and 1997.

The existing ODS agreements would be terminated effective upon the execution of an ODS termination agreement, and thereafter Delta would be relieved of all ODS contractual, regulatory, and statutory requirements. Delta would agree to use $35 million of the funds to cover payments required to ease labor's transition to highly productive ships. The remaining $490 million would be used to acquire 10 new diesel propelled dry cargo container ships with a capacity of 1,000 to 1,600 TEU's, each and related equipment including containers, to reconstruct and otherwise obtain adequate container terminal facilities; and to cover losses incurred from unsubsidized operations during the transition period.

Alternatively, and in the event the Secretary determines that the public interest would be better served by a smaller vessel replacement program, Delta proposes that the Secretary agree to pay Delta $325 million, plus the $35 million for the labor payments described above, in exchange for which Delta would agree to acquire only five new containerships and related equipment.

Delta would agree to document these vessels under the U.S. flag and to operate them with U.S. labor for the vessels' statutory lives. Delta would further agree to provide minimum service levels between the United States and South America and Africa. Notice of the Delta application was published in the Federal Register on August 22 of last year, and comments have been received. A hearing was requested, and the manner is currently pending before the Maritime Administration.

Now, the second application that I referred to is that of Lykes Brothers. Lykes has proposed to forego what it estimates to be $3.5 to $4.5 billion in subsidy over the remaining 17 years of its contract based on a 44-ship fleet and eight separate services. It proposes to receive eight annual installments of $137 million each, and upon termination after those eight annual installments, be relieved of all ODS contractual, regulatory, and statutory requirements.

Lykes Brothers would also agree to continue as a U.S.-flag operator and to provide service between U.S. ports and overseas areas with U.S.-flag vessels for a period of time to be agreed upon. Lykes also expects to maintain or upgrade its service through a fleet modernization program commencing with construction of up to six container vessels of 2,500 TEU capacity for its Far East service and three to four container/bulk vessels for its Mediterranean service.

Lykes further proposes to construct a portion of the vessels under the modernization program in domestic U.S. shipyards provided the Secretary agrees to provide additional subsidy termination payments within contract limitations until the additional expenses incurred by U.S. construction have been recouped by Lykes.

Notice of the Lykes application was published in the Federal Register on November 16, 1983, and numerous comments have been received. A hearing was requested, and this matter is also currently pending before the Maritime Administration.

Now, in addition to these two applications, on October 17, 1983, the Maritime Administration published a Notice in the Federal Register proposing guidelines for considering applications of subsidized operators for ODS contract amendments or terminations.

In the same notice, comments were requested on the proposed guidelines by Sealand Services, Inc., dated May 16, 1983, and the Council of American Flag Ship Operators, dated September 8, 1983, both of which concern early termination of ODS contracts.

Extensive comments were received regarding these guidelines, particularly on the issue of whether there is statutory authority for ODS termination agreements. The Maritime Administration is close to a decision on whether or not the Secretary of Transportation has sufficient statutory authority to enter into and use ODS for payments under an ODS termination agreement.

It is anticipated that a decision on the legal authority issue will be announced within the next 30 to 60 days. It is appreciated that substantial time has elapsed in review of this issue, but the matter is still under review at the present time.

With respect to the merits of an ODS termination agreement, since specific applications are pending before the Maritime Administration, I can only indicate the range of viewpoints filed with the agency. Comments received from unsubsidized operators, unions, and a shipyard association in response to notices of applications of

Delta and Lykes and on the guidelines themselves essentially oppose the concept, because they claim several points, which are as follows:

One, they say there is no statutory authority for an ODS termination agreement, and that Congress should devise any alternative to the ODS program. They also say that ODS was intended to benefit American seamen. Payments under an ODS termination agreement would abrogate this intention.

They further say that ODS termination agreements would not have the safeguards of the ODS program. They say that payments under the ODS termination agreement would give subsidized operators an unfair advantage in operating in the Jones Act market. They also say that payments under ODS termination agreements would allow the subsidized operators an unfair competitive advantage over unsubsidized operators in the foreign trade.

Now, the subsidized operators and an association of subsidized operators support the concept of ODS termination, and they claim that there is legal authority for ODS termination agreements, that the agreements would relieve Government of the immense ongoing subsidy dollar obligations, that the agreements would enable subsidized operators to modernize their fleets, and aid the transition to unsubsidized status.

They further claim that the agreements would be consistent with administrative deregulation efforts, and would remove unnecessary restraints on competition.

This concludes my prepared statement, except to note that we welcome the interest of the subcommittee on this issue, and that we will include in the appropriate dockets the transcript of my testimony in this hearing.

Thank you.

Senator STEVENS. Senator Inouye, do you have any questions?

Senator INOUYE. Thank you, Mr. Chairman.

I realize you are a member of the Maritime Subsidy Board, and it is not my intention to discuss the merits of any specific application now pending before the Board. Nevertheless, if you feel any of my questions raise issues under your ex parte rules or the *Pillsbury* case, do not hesitate to say so.

Mr. BROWN. Certainly, Senator.

Senator INOUYE. Among the objections raised by the opponents of ODS' buy outs, there are several that concern me. For example, opponents maintain that payments under an ODS termination agreement would give subsidized operators an unfair advantage in operating in Jones Act trades. Could you comment on that?

Mr. BROWN. Well, I will comment to say that that contention has been raised by the unsubsidized operators and others in the dockets that I referred to, and it is currently before us for consideration, and we are actively considering all aspects of the matter.

Senator INOUYE. I presume it would not be proper for you to give your views on that?

Mr. BROWN. No, Senator; I am afraid that it would not.

Senator INOUYE. I suppose it would be improper for you to tell us how you feel about whether it would provide an unfair competitive advantage over unsubsidized operators in our foreign trades.

Mr. BROWN. That is correct, Senator.

Senator INOUYE. I have been told that the amounts cited in your statement regarding Delta's buy out proposal is $195 million instead of $325 million as set forth in your statement. Is that correct?

Mr. BROWN. Excuse me, Senator. You say the amount in Delta?

Senator INOUYE. I have been advised that the Crowley Co. is now willing to terminate and settle the Delta subsidy contracts for $195 million payable in six equal annual installments of $32.5 million, with a legal binding obligation to construct four modern, efficient vessels to maintain regular service to Latin America by at least 6 years. Is that the latest proposal?

Mr. BROWN. Looking at the application filed on August 15, 1983, it states that Delta proposes that the Board agree to pay Delta $525 million in six payments over the next 5 years. That is the basis for my statement, sir.

Senator INOUYE. That is the early one; and then Crowley came down to $325 million, and now I understand it is $195 million. Have you received this latest proposal?

Mr. BROWN. The intent of our statement is to reflect the current status of the application. If there is some variance there, we would be happy to note it for the record.

[The following information was subsequently received for the record:]

By application dated August 15, 1983, Delta proposed that the Government agree to pay Delta a total of either $525 million or $360 million in settlement of the Government's long-term obligations under Delta's ODS Agreements. Delta has not amended its application to reduce to $195 million its request for an ODS Termination Agreement.

Senator INOUYE. Well, Mr. Chairman, because of the witness's membership on the Subsidy Board, I do not feel that he can respond to most of my questions.

Mr. BROWN. Perhaps I could just say one thing further, Senator. The intent of my entire statement was to accurately reflect the state of the record that is before us. My statement is based upon the record that we have submitted before us in terms of our summarization of the contention of the parties and of the applicants. That is the sole basis for that portion of the statement, not any independent views that I might have.

Senator INOUYE. I have a few questions which I hope will not give you any problems. What is the status of funds appropriated in fiscal 1983 and 1984 to liquidate ODS obligations incurred in those years?

Mr. BROWN. I would be happy to respond to that for the record, sir.

[The following information was subsequently received for the record:]

In the formulation of the Administration's budget request for FY 1985, the Office of Management and Budget adopted a new practice under which operating-differential subsidy (ODS) appropriated funds not used and not expected to be used in prior years are to be withdrawn rather than carried over into FY 1985. The unused funds identified for withdrawal as of the end of FY 1983 total $53,974,000. Equivalent funds prospectively identified for FY 1984 in the 1985 request total $48,794,000. Since the submission of the FY 1985 request an additional $12,500,000 has been identified as unneeded in FY 1984.

Senator INOUYE. How does MarAd estimate the dollar amount it will need to liquidate ODS obligations in any 1 fiscal year? How do you estimate that?

Mr. BROWN. I would have to answer that one for the record, if I could, sir. I am not entirely sure that I could. I will have to give it some thought and answer it for the record if we can.

[The following information was subsequently received for the record:]

In preparing its estimates of the amounts needed to liquidate obligations for accrued operating-differential subsidy with respect to subsidized voyages in any one fiscal year, the Maritime Administration generates first an estimate by trade route, of the number of such voyages that will take place, based on historical experience and current expectation of the level of subsidized activity in the budget year. This anticipated level of activity expressed in ship years is then multiplied by tentative subsidy rates that reflect the subsidizable costs of U.S. operators, on the one hand, and the estimated costs of the foreign-flag competition, on the other, to yield an estimate of the amounts needed.

Senator INOUYE. Assuming there is a surplus in the ODS account, is it MarAd's view that it may properly make expenditures for the re-engining of U.S. vessels without additional legislation in the form of an appropriation?

Mr. BROWN. I am not prepared to answer that question, sir, at this time.

Senator INOUYE. Before such a program was undertaken, would additional legislation authorizing reengining be required?

Mr. BROWN. Again, I am not in a position to answer that question, sir.

Senator INOUYE. In MarAd's guidelines for ODS buy-outs, many of the points repeat almost verbatim the declaration of policy section, section 101, and the Merchant Marine Act of 1936. One major difference is that in guideline item 1(c), which at most points corresponds with section 101(d) of the act, MarAd has omitted the requirements on vessels being constructed in the United States.

Since MarAd apparently feels that the termination provisions in general should follow the overall purposes of the 1936 act, why has this important factor been ignored in the guidelines?

Mr. BROWN. Well, you are asking what MarAd feels. Those are proposed guidelines that were put out that are currently under review, and they are really part and parcel of these applications, and so for that regard I really think I cannot go beyond the record on that.

Senator INOUYE. Under your proposed buy-out guidelines, could not an ODS operator use buy-out funds to build a Jones Act fleet?

Mr. BROWN. Again, I would have to say that those guidelines have been the subject of intensive comment in connection with the pending applications, and I really wouldn't want to respond to what our final guidelines would be on that.

Senator INOUYE. Has MarAd made any economic impact studies concerning the consequences on the U.S. liner industry of an ODS buy-out policy?

Mr. BROWN. I do not know, sir. I personally do not know. I would try to see if we can answer that for the record.

[The following information was subsequently received for the record:]

The Maritime Administration has not made any economic impact studies concerning the industry-wide consequences of ODS buy-outs.

Senator STEVENS. Senator, may I interrupt?

Senator INOUYE. Yes.

Senator STEVENS. Mr. Brown, we had this hearing because the Senator from Hawaii has asked to hold up a matter that the administration wanted to proceed with, and you are entitled to have consideration of it by the Senate, but the Senator is also entitled to have some answers to his questions. Who can answer the questions that you are unable to answer?

Mr. BROWN. Well, sir, I am the witness here, because we have these legal matters that are before the administration. To the extent that they are otherwise, I would be happy to provide prompt responses.

Senator STEVENS. Would you suggest that we pass a resolution suspending your action so that you can answer the questions?

Mr. BROWN. No, sir. We would be happy to respond as quickly as we could.

Senator STEVENS. I think we had better take a 10-minute recess and call somebody to get him up here to answer these questions, because the administration wants a response, and the Senator from Hawaii is entitled to a response. I do not see any reason to hold a hearing and have the Senator from Hawaii's questions be answered that you cannot answer the questions because you have a conflict.

We respect your conflict. I am not criticizing you. But someone had better come and answer these questions if the administration expects me to proceed with a matter that they want me to proceed with.

Mr. BROWN. Sir, I will answer all the questions that I can, and those that I cannot, to the extent that I am not precluded by *ex parte* or *Pillsbury*, I will have answers provided.

Senator STEVENS. Do you not know how they figure ODS estimates for the year, or how much the budgetary requirements would be for the year?

Mr. BROWN. I can get that answer for you very quickly, sir.[1]

Senator INOUYE. And you are not certain whether an impact study was made?

Mr. BROWN. I can provide that answer for you, sir, yes.[2]

Senator INOUYE. I would think such a study would be basic if you are going to make a major change in your rules which many parties contend will have a significant impact upon the industry. I would think that the responsible way of proceeding would be to make a study, and if the study has been made, I for one as a member of this subcommittee would like to see a copy of it.

Title 6 of the Merchant Marine Act is the title authorizing ODS, and of course the purpose of that section is to provide operating parity for U.S.-flag operators. Suppose an operator uses funds he received as a result of ODS buy out to build or acquire replacement vessels. Would the acquisition of those replacement vessels with ODS funds be consistent with the intent of Congress as to the purpose of the title 6 ODS program?

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[1] See p. 7.

[2] See above supplied material.

As you know, the purpose of that section is to provide parity for U.S.-flag operators.

Mr. BROWN. Senator, I hesitate to respond this way, but again, this is part of the very same application that Lykes and Delta have before us, I believe.

Senator INOUYE. I have a few other questions which may be responded to in a similar manner, but I would like to submit them to you, and if you feel that you cannot respond, just so indicate.

Mr. BROWN. Thank you, Senator.

Senator INOUYE. Thank you very much, Mr. Chairman.

Senator STEVENS. We understand the restraints you are under. It is my understanding that Admiral Shear's statement has indicated that there is no question as to the ODS contract amendment authority.

Mr. BROWN. That is correct, sir.

Senator STEVENS. Now, it is my understanding you are now studying the situation to see if the termination of these contracts is within the overall intent of the existing law. Is that correct?

Mr. BROWN. That is correct, sir. We request the parties address that issue. They did do so. Obviously, the people who are seeking this say that we do have the authority. Those that are opposing it say that we do not have the authority, and as I indicated in my statement, we hope to have the resolution of this issue within the next 30 to 60 days.

Senator STEVENS. Do ODS contract amendments involve payments to the contractor, or a modification of payments from the contractor? Or modification of the subsidy to the contractor? What is the amendment? I do not understand it.

Mr. BROWN. An amendment would mean you would change the contract, but you are still paying for services performed. In other words, you might add more or less ships. You might shorten the time period. You might change some of the trade routes. But it is a payment for services performed as opposed to the termination concept, which is that you are paying someone to terminate the contract. That is the essential distinction as we see it.

Senator STEVENS. The net result of an amendment is a net savings to the Government?

Mr. BROWN. Yes, sir.

Senator STEVENS. Have any of those resulted in payments to the contractor, is my question.

Mr. BROWN. Certainly they result in payments to the contractor?

Senator STEVENS. Increased payments to the contractor?

Mr. BROWN. I think it depends over what period of time you are talking about and how many vessels are involved. Over the long run, you are talking about a savings. Whether in any particular year more ships were under ODS than previous, I think in some instances they were.

Senator STEVENS. I just want to understand this. If the provision before the Secretary were to amend the contract to pay any one of these contractors different payments over a period of 5 years, during which time the obligation of the contract would be maintained, that would be within the existing authority of the Secretary?

Mr. BROWN. Let me see if I understand your question, Senator. If they were seeking to change the terms of the contract so that it would be for a shorter period of time or for more vessels, or a different route, would that be within the authority of the Secretary? Yes, it would be within the authority of the Secretary.

Senator STEVENS. Well, we are hopeful other witnesses will provide some answers. I would urge you to transmit the answers that you have indicated you will provide for the record as quickly as you can, because of the circumstances we face. The Senator from Hawaii is entitled to resume his request that he deferred on at my request that we hold this hearing, and I think he is entitled to some answers in view of the situation.

Mr. BROWN. I understand, Mr. Chairman.

With regard to the question about the budgetary sums, rather than give you my estimate or my approximation, I would rather refer to the actual document and give you the actual sums in the interest of accuracy, and I will do that promptly.

Senator INOUYE. I would like to ask one question, if I may.

Mr. BROWN. Certainly.

Senator INOUYE. In the case of United States Lines, where the termination payment was $165 million over 5 years, I believe you testified that it saved our Government considerable numbers of dollars.

Mr. BROWN. That is correct, sir.

Senator INOUYE. And the United States Lines would only be paid under the ODS contract for actual voyager it made.

Mr. BROWN. It was a 5-year period rather than a longer period, so there was a net saving to the Government. They increased the number of vessels, but only for a 5-year period, so that is the way the net saving was obtained.

Senator INOUYE. Under the application submitted by Delta, would there be net savings also to the Government?

Mr. BROWN. Delta contends so, sir.

Senator INOUYE. How do you contend?

Mr. BROWN. I am afraid I cannot really respond to how the Maritime Administration will adjudicate that until we do so, but I will say that Delta's contention is that there would be savings.

Senator INOUYE. Under that application, would Delta have to perform under the contract before it was paid?

Mr. BROWN. Well, as they characterized it, I believe that they would change their service. We said in our statement that Delta proposes to be relieved from their ODS contractual, regulatory, and statutory requirements, and to use the payments in the manner which I described them. It would not be the same thing as operating under ODS, which is what the United States Lines application did.

United States Lines is operating—receiving ODS for ODS service for that period. Delta's application is as we have characterized it in our statement.

Senator INOUYE. United States Lines was a termination.

Mr. BROWN. An amendment, sir. Delta would be a termination. I have drawn that distinction between the two of them. In an amendment you still have an ODS contract, and an ODS obligation. You are paying for the services as they are performed.

Under termination, the contract is terminated. As I understand these applications, what the applicants would like us to do, is pay them a sum to terminate a future contract, rather than pay them as the vessel completes a voyage—paying the subsidy that would be applied to that particular voyage.

Senator Inouye. Under the Lykes Bros. application, would there be a net savings to the U.S. Government?

Mr. Brown. Again, I believe Lykes contends that there would be, and that is a matter that is presently before us, sir.

Senator Inouye. And you are not able to respond as to whether you believe there is a net savings or not?

Mr. Brown. No, sir. I am afraid that I am bound not to respond.

Senator Inouye. Is it not possible to mathematically reach a conclusion?

Mr. Brown. Well, I do not know that it is possible legally to respond at this point. I had discussions with Mr. Dye and Mr. Hardy about what I can and cannot say on this, and it is a matter—it is a contention of a party in a pending matter, and I do not think that I or any member of the board can respond at this point.

Senator Inouye. Thank you very much, Mr. Brown.

Thank you, Mr. Chairman.

Senator Stevens. Thank you very much.

Mr. Brown. Thank you, Mr. Chairman. I appreciate the opportunity to appear before this committee, and I am sorry that the legal restraints prevented me from answering some of the questions that the committee put to me.

Thank you.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. A major reason MarAd has a surplus in its ODS account for FY '83 and FY '84 is that the amount of idleness in the subsidized fleet was greater in those years than MarAd had projected when it calculated the amount of ODS required. This, of course, can happen because MarAd's ODS calculations are *prospective,* and there is no way to ensure an ODS vessel will be as active as projected. The safeguard is that the operator is only paid ODS for the voyages he makes.

Is there provisions in MarAd's buy-out guidelines which has a similar safeguard? In other words, when MarAd negotiates a buy-out does it calculate its cost for the remaining life of the contract based on the assumption that the operator will fully utilize his vessels during that period; or would MarAd discount that total cost under a formula which takes into account that the vessels may very well have been idle for some of the time, had the ODS contact been in effect for its entire life.

If MarAd does not discount the total cost of the remaining life of the ODS contract, isn't MarAd starting its negotiations for an ODS buy-out from an unrealistically high figure?

Answer. MarAd's proposed guidelines concerning ODS Termination Agreements, published in the Federal Register on October 17, 1983, contained no provision that ODS would only be paid for voyages made. By defintion, the concept of ODS Termination Agreements involves payments for voyages that may be made in the future. Whether any MarAd final guidelines will calculate the cost for the remaining life of the ODS contract based on the assumption that vessels may be idle in the future, depends in the first instance on whether there is legal authority for any ODS Termination Agreement. That is a key issue pending in docketed proceedings before MarAd. Therefore, I cannot legally respond to that question at this time. Even assuming there were legal authority for such Agreements, the method of calculation of the Government's total cost exposure under the contracts is also an issue in contention pending before MarAd and therefore I cannot legally respond to that question other than to indicate that if there are to be final guidelines they will include necessary safeguards. As I stated, we expect a decision on the question of legal authority within the next 30 to 60 days.

Question. According to statistics I have seen, about 90% of ODS is for wage differential. It has been proposed that ODS should be paid directly to American seafaring personnel through a fund established in the Department of Labor; and U.S.-flag companies would pay directly to labor the same package paid to foreign labor by the major-flag competitors. This would also release management from ODS obligations and thus give it managerial and operating flexibility.

What are your views?

Answer. The stated proposal was made as part of comments received from the public on the guidelines governing ODS termination agreements. We see a number of complex legislative and administrative problems associated with the proposal. However, it is being included in our ongoing overall review of various alternatives to simplify and streamline the ODS program and to provide U.S.-flag operators with maximum operating flexibility.

Senator STEVENS. We have received two letters from Thomas W. Gleason, International Longshoremans Association. We will print them in the record at the conclusion of the testimony this morning.

The next witness is Mr. Frank Drozak, the president of Seafarers' International Union of North America.

Good morning, Frank.

STATEMENT OF FRANK DROZAK, PRESIDENT, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Mr. DROZAK. Good morning, Mr. Chairman.

Mr. Chairman and members of the subcommittee, my name is Frank Drozak. I am president of the Seafarers' International Union of North America, AFL-CIO.

I appreciate the opportunity to participate in this oversight hearing on the status and condition of the vessels Operating Differential Subsidy [ODS] Program. This hearing is long overdue, because we appear to be in a critical crossroads in the life of the ODS Program and the future of the U.S. Merchant Marine.

As the U.S. fleet fights for survival, we will need strong, supportive Government policies to maintain and rebuild a healthy industry. Now is the time to resolve the many questions which overhang this program. We must determine its course for the future so that we can see the general direction of the entire industry.

Over the past 4 years, the ODS Program has been the subject of many profound changes, but little serious attention. While most of the industry's focus has centered around the administration's elimination of the Construction Differential Subsidy Program, the ODS Program has quietly but consistently been weakened. Funding for ODS has been steadily reduced over the past 4 years, and the administration has unilaterally suspended the negotiation and implementation of any new ODS contracts.

We all know that the administration would like to eliminate ODS. The only reason the program exists today is because of the Government's contractual obligations, but now the administration sees a way around this. By permitting contracted companies to terminate or amend their existing ODS contracts, and by refusing to implement new contracts, the administration can effectively kill the program.

For this reason, we strongly oppose the administration's so-called ODS buy out proposal. Like the CDS Program, the ODS Program was enacted as an essential component of the Merchant Marine

Act of 1936, and was intended to facilitate the development of a U.S.-flag merchant fleet, and to help it to compete in the international shipping community.

Section 101 of the 1936 act states that a U.S. merchant fleet is necessary for U.S. national defense and for the development of its foreign and domestic commerce. It further states that this fleet should be of sufficient size and be composed of the most suitable mixture of vessels manned by highly trained and efficient civilian crews which will be capable of serving a naval and military auxiliary and carrying a substantial portion of our foreign commerce.

The ODS Program has served the Government well in this capacity over the last four decades. It has provided a means of operating American ships which have served in essential U.S. foreign trade routes, and which have provided necessary sealift capability, and has also helped to develop and maintain an essential pool of highly skilled commercial manpower.

Many people feel that the program is no longer as effective as it once was. That may be true. But it is not a fault within the program itself. The problems are caused by a changed world market and increased foreign competition. Foreign competition is keener now than it ever was. More and more countries are entering into the maritime field, and world freight rates have reflected this competition.

These foreign fleets have benefited from greatly expanded support and subsidy from their own home governments while U.S. support for its fleet has declined. Moreover, the world shipping market has been experiencing a long and deep depression which has contributed to the worldwide overtonnaging and which in turn directly benefits low-cost foreign fleets.

The ODS buy out proposal does not respond to any of these problems. Instead of increasing U.S. support for its fleet to help it to compete in the changed world market, it undercuts the Government's last active program to make U.S. ships competitive in world shipping. Its real effect would be to wipe out the prior accomplishments of the ODS Program by reducing the number of vessels and jobs in the U.S. merchant fleet.

The proposal contains no requirement that operators replace current ODS vessels with U.S.-built, U.S.-crewed, or U.S.-flag ships, and it may harm the domestic fleet as well, because it lacks any restriction against ODS operators entering into and preying upon the unsubsidized domestic trades.

The administration should strengthen existing programs or develop new programs and policies to address the legitimate operational needs of the U.S.-flag fleet. The U.S.-flag fleet competes in the international maritime environment in which free trade exists only in the minds of speech writers and those who wish to avoid the sometimes difficult effort necessary to support a healthy U.S.-flag fleet.

The elimination of ODS would not be objectionable if the American maritime industry could fall back on a well crafted substitute program which deals effectively with the competitive advantages provided by foreign governments to their own fleets. Unfortunately, we have seen nothing of this kind.

Another reason we strongly object to this proposal is that it continues the administration's pattern of unilaterally dismantling existing maritime programs. While Congress has been active in considering new programs to increase the U.S. fleet, the administration has preferred to arbitrarily tear down existing programs without replacing them.

We feel that instead of the administration deciding on its own, Congress should be advised of program options and be given a choice between existing programs and alternatives. The governing process should not be circumvented by substituting unilateral agency decisions for full legislative consideration.

As for the ODS buy out proposal, we question whether the Maritime Administration has the legal authority to terminate or amend existing contracts. Industry comments to MarAd clearly point out that buy outs violate the intent of Congress in establishing the ODS Program as well as the intent of Congress in more recent legislation.

Another issue which has surfaced recently in conjunction with the ODS Program is the possibility of a carryover of unspent ODS funds into fiscal year 1985. This committee is well aware of the possibility of an ODS surplus and is taking steps to ensure that such funds will be used exclusively for the purposes for which they were intended.

The committee is to be commended for staying on top of this development and for taking prompt action. This possibility of a surplus of funds does, however, present this committee and Congress with a rare opportunity. By reprogramming surplus funds, Congress could quickly provide substantial aid to the maritime industry without having to appropriate new funds.

There are numerous areas where these funds would greatly help the U.S. maritime industry. The two areas where they could be most effective, however, are seamen's health care and pension plans. Reprogramming for this purpose should not be rejected offhand as being an improper use of funds or as benefitting only one segment of the industry, for in actuality the use of these funds in this manner would be consistent with the rationale behind the establishment of the ODS Program and it would benefit the entire industry, not just maritime labor.

In addition to increasing U.S. competitiveness and maintaining a U.S.-flag fleet, one of the principal reasons Congress established the ODS Program was to provide employment for seafaring labor. A reading of the 1936 act itself as well as its legislative history strongly suggests that the Act was primarily intended to benefit labor. The use of any unspent ODS funds for seamen's health care or for pensions would therefore be wholly consistent with the intent of the program.

In addition, seamen's health care and pension plans are both areas in which the Federal Government has previously been involved and in which it bears responsibility. For nearly two centuries, the medical needs of American merchant seamen were met by the U.S. Public Health Service hospitals and outpatient clinics. This system was especially founded for the benefit of merchant seamen in recognition of their important role in national commerce and defense, as well as for the health hazards inherent in shipboard life and the unavailability of medical care at sea.

In 1981, however, the Federal Government abruptly chose to reject this responsibility and closed the PHS hospitals and outpatient clinics. Although many of the other groups which were served by the UID PHS system were transferred to other Federal health care programs, the American seamen were abandoned.

Consequently, the responsibility for medical care has fallen to an already ailing American shipping industry and the seafaring unions through joint labor-management welfare plans. The financial burden of this unexpected responsibility has been very high, and it has seriously strained the limited resources of the entire industry.

Needless to say, it does not increase the competitiveness of the U.S.-flag fleet. This problem could be substantially solved by placing unused ODS funds into a separate account to help offset the tremendous cost of seamen's health care today.

The other important area in which the funds could be effectively used is for pension plans. The dramatic decline in the size of the U.S. flag fleet and the decrease in the active seagoing jobs has created a huge unfunded pension obligation within this industry. This problem has continued to build as more and more seafarers retire and fewer are available for work in support of the plans.

This unfunded obligation is conservatively estimated to be around $500 million. The U.S. Government has contributed to this deficit through past unfunded services for the Government's benefit in World War II, the Korean war, and the Vietnam war. Although MarAd is currently conducting a study to examine the extent and seriousness of this problem, without a large increase in the number of active seafarers, it is probable that any solution will necessitate an infusion of outside funds.

In light of the merchant marine's past military service to this country, the use of ODS funds for this purpose would be justified. In any case, holding any unused ODS funds in a separate account for this purpose would provide an effective insurance policy until other solutions are found. If neither of these ideas appeal to Congress, any surplus ODS funds could instead be used for some type of maritime job creation.

An example would be Russian grain carriage. Ever since the resumption of U.S.-U.S.S.R. grain trade, we have continually called for the renewal of the expired bilateral maritime agreement between our two countries for the carriage of that grain. If the agreement is renewed, these surplus ODS funds could be used for the carriage of grain on U.S. vessels in the same manner as ODS funds were used for this purpose in the 1970's. This would provide work for laid-up ships and jobs for the men on the beach.

As I have tried to illustrate, there are many ways in which any surplus ODS funds could be used to benefit the industry. They definitely should not be used for any ODS contract buy outs, but neither should they lay idle doing nothing.

The industry is in far too serious trouble not to use any available funds. We would be more than happy to work with this committee in finding constructive and beneficial uses for any unused funds.

Mr. Chairman, in closing, I just want to emphasize one thing, that in the question of buy outs, the American operator, it seems, with the operating differential subsidy today, cannot compete in the international market, yet on the other hand they have so testified and filed application with the Maritime Administration.

By allowing these buy outs, they can build ships foreign, and will be able to compete in the international market. I question that very seriously.

Thank you, Mr. Chairman.

Senator **Stevens**. Thank you, Mr. Drozak. We appreciate your testimony.

Senator Inouye?

Senator **Inouye**. In your testimony you very strongly opposed buy outs.

However, I have been advised that most of labor, maritime labor, no longer opposes the Crowley-Delta application.

What is your position, sir?

Mr. **Drozak**. Mr. Chairman, as I said and stated before 2 years ago when that application was made, I was opposed to it then. I am opposed to it now. And I will be opposed to the future of any buy out until such time as Congress can develop an appropriate maritime policy program to revitalize this industry. We are doing nothing but taking from one hand to the other, patching a piece of this industry and letting the other part of it die.

The Delta or the Lykes or the U.S. Line, in my opinion, is doing nothing but reducing our fleet from some 170, 180 liner carriers—and if you look at the figures of 10 ships versus 47 ships of Lykes and Delta's 26 ships versus 6 or 10 that they would build if they got these buy outs, it is doing nothing but destroying this industry, and that is not the answer, in my opinion.

I would oppose it as I am opposed to CDS.

Senator **Inouye**. On the matter of reprogramming. As funds, reprogramming, as you know, would apply to the use of funds for purposes for which they were not originally intended.

Is it your contention that the use of these funds for pension plans or health care would be to use it for the same purpose as it was intended?

Mr. **Drozak**. I believe so, yes. I certainly do because the ODS operating subsidy, Mr. Chairman, was to offset the cost of operating costs between the foreign and American crew cost operations. Pension and welfare is part of that cost and has been part of that cost.

Senator **Inouye**. If that is the case, you will not need any legislation because under the present rules you can reprogram by just notifying the appropriate committees.

Mr. **Drozak**. I would think so, and that is why I raised that question here today, Senator.

Senator **Inouye**. Mr. Chairman, I am suggesting that counsel look into whether the use of these funds for health care and pensions would be for the same purpose as it was intended.

Senator **Stevens**. We have a request of counsel to do that.

It is my understanding there is a proposal to use some of these funds for reengining under a similar concept.

Senator **Inouye**. Do you believe that that would be for the same purpose.

Mr. **Drozak**. No, sir, I do not. Reengining is rebuilding. The ODS is the operating differential cost to operate that ship and compete on the wages and operating costs of a foreign flag operator. I do not believe that the law is specific that would say—and I am not a lawyer, either—that would say that this money could be properly used for reengining or reconstruction, for that matter.

You have a CDS program, or we had a CDS program.

Senator Inouye. Among the many proposals that we have received there is one that suggests that ODS should be paid directly to the seafarers through a fund established in the Department of Labor.

What are your thoughts on that, sir?

Mr. Drozak. Well, I do not quite agree with that. It may have some merits to it, but I think we are just shifting the obligation from one Government agency to another Government agency, and I do not think that is the proper thing to do. I think that if there is any question that the ODS funds should be strengthened, then we should strengthen it by law and not be shifting from one department to another department.

I say again, Senator, I think it has worked. While it may not have worked perfectly for all of us, it is the best thing we have had up until now. Certainly until something else comes along, I do not think we should abolish any of it.

Senator Inouye. Thank you very much.

Thank you, Mr. Chairman.

Senator Stevens. Thank you.

Frank, I do not understand your comment on re-engining. If these vessels were re-engined, they would be operating at lower fuel costs.

Would that not be consistent with the original purpose of ODS?

Mr. Drozak. I am not opposed to that. What I am saying, Senator—and I think that is a proper thing to do, is to re-engine those ships. It would save a tremendous amount of money, but I do not believe that ODS as ODS was defined, can be properly used for that purpose without Congress taking action on it, because Congress, as I view it, Congress adopted the ODS operating differential subsidy for the sole purpose of being able to compete against the foreign operator as to the crew costs and the operating costs.

I believe if you are talking about now taking ODS and building, or rebuilding an engine, you are using—you are going from one part of the law to the other part of the law, which you have as a CDS, construction differential subsidy. That is where it should lie, unless Congress approves it.

I think there is a question there about it. I am certainly in favor of it, Senator, of re-engining these ships. I think it will make them more competitive, but that is not going to be the answer to our industry.

Senator Stevens. If it would be consistent to use the funds for seaman care and for the operation of the vessels for the U.S.-U.S.S.R. grain trade, I do not understand why it would not be consistent with the purpose of the act to re-engine the existing vessels so that they could operate more efficiently and compete with their foreign fleets more effectively.

Mr. Drozak. Let me repeat again, Senator, I am not against re-engining, and if Congress feels, or this committee feels, that the ODS could and can be used for re-engining, then I would certainly support it. I say now, as we sit here today, I do not believe that ODS can be used or should be used without a clarification from Congress saying it can be used for that. That is what I am trying to say.

Senator STEVENS. Thank you very much. We appreciate it.

We have a floor vote that will take some time. It is a vote on 16 treaties. It is just 1 vote for all 16. We will stand in recess subject to the call of the Chair.

[Recess.]

Senator STEVENS. Our next witness is Mr. Peter Finnerty, vice president, public affairs of Sea-Land Corp.

I might call your attention to the fact that the House has just defeated the bill to increase the debt limit. In view of the fact that we are talking about borrowed funds, the whole hearing may be academic.

Nice to have you.

STATEMENT OF PETER J. FINNERTY, VICE PRESIDENT, PUBLIC AFFAIRS, SEA-LAND CORP., ACCOMPANIED BY EDWARD M. SHEA, COUNSEL

Mr. FINNERTY. Thank you, Senator.

If I may, I have some attachments to our statement for the record.

My name is Peter Finnerty, and I am accompanied by Edward M. Shea of Ragan & Mason.

We appreciate the opportunity to appear on behalf of Sea-Land service to voice our opposition to the concept which is called ODS buy out. Our opposition has two footings. The first is that ODS buy out would be totally unwarranted raids upon the Treasury. The second is that it would also be particularly unfair to the unsubsidized carriers, of which Sea-Land Service is the largest.

Sea-Land competes with each and every one of the seven liner operators who hold operating differential subsidy (ODS) contracts. Many of these operators have expressed an interest in ending their subsidized status, and Sea-Land strongly believes that such a step, if taken promptly, would be beneficial to them, to a stronger American merchant marine, and to the Nation.

Sea-Land has successfully competed with the other U.S.-flag carriers despite the participation by those carriers in the ODS, CDS, and title XI programs. The profound competitive inequity that could result from the ODS buy-out proposal is that while Sea-Land must, as it should, continue to look to private capital sources, buy out would give ODS contractors billions of dollars of Federal money for new ships without any need for those carriers to raise any private capital.

Sea-Land's differences with some on the issue of ending ODS concern the question of how, and under what terms and conditions, the transition to unsubsidized status is to occur.

We understand that the immediate purpose of these hearings is to assist the subcommittee in determining what the status of previously appropriated but unobligated ODS funds is, and what can be done, and what should be done, with those funds under existing law, and under new or amendatory legislation.

Sea-Land's position on these matters is, first, that those funds can, under the law, be used only for the payment of accrued ODS. I will not now elaborate on the reasons for this view, but instead, include in our submission for the record a legal memorandum which establishes this point beyond doubt.

Second, any proposal for new or amendatory maritime promotional legislation should be considered wholly on its own merits, and under the normal legislative procedures. Put another way, the consideration of such promotional proposals should be entirely divorced from the question of whether and the extent to which there are excess ODS funds. Any unexpended funds not needed for accrued payments under the ODS Program should revert to the Treasury to reduce the serious budget deficit.

It is important to understand why there currently exist unexpended ODS funds. Maritime Administration records show that for the last 2 fiscal years, ODS payments have actually gone down, and that in each of the last 4 fiscal years, less ODS funds were expended than the combination of ODS appropriations and carryovers available for the year. This has resulted from ODS operators underperforming their contracts: Primarily laying up or otherwise not utilizing old, small, inefficient subsidized vessels. This has resulted in payment of less aggregate wage payments to oceangoing labor, thereby requiring less ODS. It also stands to reason that the contracts have been less valuable to the operator in terms of derived earnings.

Turning to the merits of the legislative proposals likely to be considered, without question, the most adverse proposal is that for the buy out of existing ODS contracts. Some definition of terms is needed here, for there is a considerable difference between proposals to buy out ODS contracts on the one hand, and ODS contract amendments, which continue the contract in effect but reduce the remaining years of its term.

The buy-out proposals would involve immediate release of ODS operators from their contractual obligations, and the Government's payment of a windfall bonus to the ODS operators. In contrast, the concept of ODS contract amendment involves payment of ODS that is actually earned by the operators for a transition period that is less than the remaining life of the ODS contract. During that transition period, the operators would rebuild their fleets with modern, automated U.S.-flag vessels which operate without ODS.

Another critical difference between buy outs and ODS contract amendments is that MarAd clearly does not have the statutory authority to effect buy outs, whereas it does have the authority to enter into ODS contract amendments.

MarAd has never finally accepted a buy-out proposal, and the reasons why it is without authority to do so are elaborated upon in the submission cited as attachment 1.

MarAd has, however, entered into an agreement to amend an ODS contract to shorten its length: Its agreement of June 1982 with United States Lines, Inc. (USL). Under that agreement United States Lines will go off subsidy in the trans-Atlantic and trans-Pacific trades in June 1987 after delivery of 12 new and more efficient foreign built, U.S.-flag vessels. In Sea-Land's view, that agreement represents a dramatic competitive breakthrough and a proper maritime policy innovation.

However, as is to be expected with any first, problems have arisen. Those problems relate to the fact that United States Lines has since increased its position as a subsidized operator on several other trade routes. Therefore, United States Lines is evolving into a substantial mixed subsidized/unsubsidized operator. MarAd will have to clarify the rules concerning the rights and obligations of such mixed status carriers.

Returning to the ODS buy-out concept, there have been both specific buy-out proposals made to MarAd by ODS operators and proposals for guidelines to be followed by MarAd in handling buy-out applications. Those proposals are all predicated on the erroneous claim that MarAd currently has the authority to enter into such transactions.

As I have already noted, Sea-Land and other commentators, including elements of organized labor, strongly and persuasively dispute that claim.

Brief analyses of each of those buy-out proposals, as well as the United States Lines ODS contract amendment, are contained in attachment 2, and I request that it also be made part of the record.

In August 1983, Delta Steamship Lines, Inc. [Delta] proposed a buy-out agreement under which it would be immediately released from the obligations of its two ODS contracts, and the Government would pay it a buy-out bonus of $525 million over a 5-year period. That amount, spaced over a 5-year period, has a net present value of $402.9 million. Net present value [NPV] is the amount of money today that will grow to a given amount in the future. In our NPV calculations, we have used a conservative 12-percent discount rate. If, on the other hand, one simply takes the average annual ODS earned by Delta in the last 3 years—$65 million—for providing service on essential trade routes and multiplies it by the remaining life of the contracts—12 years—the result is a potential total Government outlay for total contract performance of $780 million in ODS; or an NPV of $402.6 million. Thus, in NPV terms, Delta wants slightly more money as a bonus for having its ODS contract bought out as its projected ODS for contract performance over the entire contract life.

It cannot really be argued that the buy out would save the Government the difference between the projected $780 million ODS for the full life of the contract and the $525 million requested by Delta. The $780 million is significantly overstated. This is so because the greater portion of Delta's 1983 subsidized fleet was and is too inefficient to compete, and also will reach the end of section 605(b) eligibility long before the end of the contract life. Those vessels will be replaced on less than a one-for-one basis with more productive vessels with smaller crews, thus leading to smaller ODS outlays.

In that regard, MarAd's 10-month suspension of consideration of the Delta buy-out proposal has potentially saved the taxpayers millions of dollars. This is so because Delta earlier this month sold six of the vessels in its subsidized fleet to the Navy for $9 million. Delta had undoubtedly factored ODS on these vessels into the self-serving estimate of the worth of its ODS contracts.

In October 1983, Lykes Bros. Steamship Co., Inc. [Lykes] proposed a buy-out agreement under which it would be immediately released from the obligations of its ODS contract, and the Government would pay it $1.1 billion over an 8-year period. Here, the cost in real dollars to the Government would be significantly greater than the projected cost of maintaining the status quo under the Lykes ODS contract. Using the same methodology as that used regarding Delta, the NPV of the buy-out bonus would be $762 million, while the NPV of the ODS payments projection would be $602.5 million if the contract remained in force for its remaining 14 years.

Like the Delta situation noted above, MarAd's delay in considering the Lykes' buy-out proposal has already been cost favorable to the Government. That is, Lykes has recently sold 13 of its ODS vessels to the Navy for $21 million. Lykes had calculated that it would receive tens of millions of dollars of ODS for operations of these vessels in future years in its assertion of cost savings to the Government if the Government bought out Lykes' ODS contract. The age, size, and propulsion of about two dozen other Lykes' ships now on ODS indicates that many more of them will be sold and removed from the ODS ledger with or without replacement by more efficient vessels requiring less ODS.

Based on these experiences, it appears that the best course for the U.S. Government to follow in terms of minimizing ODS costs is to do nothing. That message should be clear to both Congress and the executive branch.

In that context, we now turn to the MarAd guidelines covering both buy outs and ODS contract amendments, which were proposed in October of last year, and as to which nothing has yet occurred.

As regards buy outs, the proposed MarAd guidelines would contemplate up front payment of up to the equivalent of ODS budgeted in the current and 4 subsequent years. Since annual ODS has been running in the $300 million range for liner operators—less USL in the transatlantic and transpacific trades—the exposure to the United States if all ODS liner operators took advantage of this would be $1.5 billion of up-front bonuses upon ODS contract buy out. Since the average remaining length of an ODS liner contract is 13 years, the Government would pay out a—unrealistically high, for the reasons stated as regards Delta and Lykes—projected $3.9 billion over the lives of those contracts without allowing potential cost savings due to replacement of existing vessels. The NPV of $3.9 billion is $1.93 billion: or only 29 percent more than the $1.5 billion which would be payable up front if all ODS operators immediately took advantage of MarAd's buy-out guidelines if they were adopted and Congress authorized them.

In comparison, the Council of American-Flag Ship Operators [CASO] submitted proposed buy-out guidelines in which the minimum amount for an ODS buy out would be 60 percent of the past 3 years average annual ODS times the years remaining on a given contract. Using the payment calculations and assumptions in the previous paragraph, the CASO proposal would constitute a $2.34 billion bonus, which is substantially in excess of the $1.93 billion NPV stated above. Even if the $2.34 billion proposed by CASO were paid over an 8 year period, its NPV would be $1.45 billion, or about 75 percent of the NPV of all ODS liner contracts.

Mr. Chairman, buyouts would be, to put it bluntly, a ripoff of the American taxpayer. At the heart of the buyout concept is the notion that ODS operators should be paid a bonus not to perform the service and other obligations of their ODS contracts. The windfall that the bought-out operators would realize from such an arrangement would be tremendous, for they would be able to use the bonus to build a fleet of vessels at no equity costs to themselves.

I should add that those cost-free vessels would give those operators an unbelievable competitive advantage over Sea-Land, an advantage totally financed with tax dollars. Such windfall payments would be in addition to the $6½ billion of operating subsidy outlays since 1937.

Considering all of these facts, it is not surprising that last month the House Merchant Marine and Fisheries Committee refused to approve a legislative provision in H.R. 5220 relating to use of funds from buyouts. That committee, because of the concern of many members that the provision could imply congressional approval of ODS buyouts, voted to delete that provision from the bill.

The alternative to buyouts, that is, ODS contract amendments, does not suffer from any of these critical flaws. The ODS operators quite expectedly argue that contract amendments would not give them any benefits. The only benefits which ODS operators would lose is the windfall. They would still receive the following benefits.

First, and most important, contract amendments would allow construction of new vessels wherever economics dictate, in U.S. yards or in foreign yards. Second, contract amendments could set a date by which the requirement for the use of U.S.-built vessels would no longer apply and permit operators to construct U.S.-flag vessels in the meantime. Presumably, MarAd would provide in the contract amendment agreements that any replacement obligation which would otherwise be due during the transition period would be waived.

Third, the U.S.-flag vessels which those operators would acquire would be competitive with any now operated anywhere in the world. After those vessels are acquired, and the ODS contracts are terminated, those operators would be entirely free of the restrictions of their ODS contracts. They would have complete freedom to operate their new U.S. flag vessels wherever and however they chose, unrestrained by the former ODS contract geographic and maximum-minimum service restraints.

The benefits I have described from ODS contract amendment are not just theoretical ones. Any contention that this would not help ODS operators is directly belied by the fact that two of those operators, U.S. Lines and Lykes, have elected to take just such a course. I have already referred to the U.S. Lines agreement which was entered into 2 years ago and demonstrates the need for new rules which I referred to earlier. Lykes is proposing a contract amendment to MarAd which will call for termination of subsidy for all of Lykes' trans-Pacific services no later than December 31, 1986, or upon the delivery of six highly automated foreign-built U.S.-flag vessels it is going to build, whichever first occurs.

If, despite all of the negative aspects of buyouts, this committee decides to consider authorizing such transactions, then the proposal should be processed in normally thorough congressional hearing procedures regarding legislation involving expenditure of substantial Government funds.

Before concluding, Sea-Land shares the belief of virtually everybody in the industry that a new overall merchant marine policy must be developed. Until that is done, however, I repeat that it is better for the U.S. Government to do nothing rather than to take the step of bailing the ODS operators out of their contracts through a huge bonus buyout program.

This concludes my prepared statement. I thank you for the opportunity to present these views, and we would be anxious to respond to any questions you may have.

[The attachments referred to follow:]

ATTACHMENT 1.—LEGAL RESTRICTIONS ON USE OF OPERATING DIFFERENTIAL SUBSIDY FUNDS FOR BUY OUTS

1. INTRODUCTION

This memorandum (1) analyzes the legal restrictions on the availability of appropriations made to the Maritime Administration (MarAd) for the operating differential subsidy (ODS) program and (2) concludes that such appropriations are not available for the purpose of making payments to vessel operators under "buy-out" agreements.

2. "BUY-OUT" DEFINITION

The Maritime Administration has promulgated "Proposed Guidelines for the Consideration of ODS Contract Amendments and Terminations." MarAd's proposed guidelines offered two distinct and very different avenues for abbreviating the current ODS contracts authorized by Congress in Title VI of the Merchant Marine Act of 1936: (1) "ODS Contract Amendment," defined as "An amendment that provides for a significantly earlier termination than provided in the existing agreement with ODS payments for services actually performed or such lesser amounts as may be agreed," and (2) "ODS Termination Agreement," defined as "An agreement to terminate an existing ODS contract in return for certain settlement payments by the Government and for certain settlement payments by the Government and for certain agreed obligations to be rendered by the contractor." In this memorandum, the term "buy-out" refers to the latter, the ODS Termination Agreement. A "buy-out" severs the legislative tie between payments and actual operating expenses, and thus represents a "bonus" or "grant" to ODS contractors.

3. CONSTITUTION

The Constitution states the fundamental principle that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Constitution, Art. I, § 9, cl. 7. Congress, of course, has plenary power to give meaning to this provision. *Harrington* v. *Bush*, 553 F. 2d 190 (D.C. Cir. 1977).

4. GENERIC FEDERAL FINANCIAL MANAGEMENT LAW

One of the most important implementing statutes is 31 U.S.C. § 1301(a), which provides as follows: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

This provision is the latest version of a statute which has existed since 1809 and is "one of the cornerstones of congressional control over the Federal purse." U.S. General Accounting Office, Principles of Federal Appropriations Law 3-2 (1982).

Among other important statutes are: 31 U.S.C. § 1341(a)(1), which states in part: "An officer or employee of the United States Government or of the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

31 U.S.C. § 1301(d), which reads in part: "A law may be construed . . . to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that . . . such a contract may be made."

And section 3732(a) of the Revised Statutes (41 U.S.C. § 11(a)) which in relevant part reads as follows: "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment."

A review of GAO's Principles of Federal Appropriations Law failed to disclose any GAO cases bearing directly upon the question of the types of expenditures which may properly be paid under ODS appropriations. The only two GAO cases located to date on whether ODS may be paid are 36 Comp. Gen. 291 (1956) and 42 Comp. Gen. 76 (1962). They deal generally with the question of whether particular voyages are properly the subject for payment of subsidy; the proper components of subsidy payment were not in issue. However, in many cases, unrelated to ODS, GAO has recognized the above principles of appropriations law and has consistently adhered to them.

It is therefore clear beyond doubt that unless ODS buy-outs are permitted by the statutes appropriating or authorizing ODS funds or in the original program legislation, the above constitutional and statutory provisions preclude the obligation of ODS funds under buy-out agreements.

5. MARAD'S ODS APPROPRIATIONS

The fiscal year '85 appropriation for the ODS program is contained in H.R. 5712, which has passed the House of Representatives and has been reported by the Senate Appropriations Committee. The language in the bill is as follows:

"OPERATING-DIFFERENTIAL SUBSIDIES

"(LIQUIDATION [1] OF CONTRACT AUTHORITY)

"For the payment of obligations incurred for operating-differential subsidies as authorized by the Merchant Marine Act, 1936, as amended, $377,750,000, to remain available until expended."

Identical language (except for amounts) has historically been used in prior appropriations bills.

The following is the language from H.R. Rep. No. 98-802, 98th Cong., 2d Sess., page 54:

"MARITIME ADMINISTRATION

"A total of $83, 807,000 in new budget (obligational) authority and $377,750,000 for liquidation of contract authority is recommended for the Maritime Administration for fiscal year 1985.

"OPERATING-DIFFERENTIAL SUBSIDIES

(LIQUIDATION OF CONTRACT AUTHORITY)

"The bill includes $377,750,000, the full budget estimate, for payment of obligations incurred for operating-differential subsidies of American flag vessels. This amount is $23,544,000 below the amount made available in the Fiscal Year [84] Appropriation Act."

Committee Report language during fiscal years '82, '83 and '84 is substantially the same.

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[1] The term "buy-out" cannot properly be construed to be within the meaning of the term "liquidation," as used in the appropriations acts and committee reports. The term means the "payment" of "obligations." See the report of the Senate Committee on Commerce, Science, and Transportation (S. Rep. No. 98-445, 98th Cong., 2d Sess. (1984)) on S. 2499, the maritime appropriation authorization act for 1985. On p. 2 the Committee observed that "The sums requested for operating differential subsidy are for liquidation of contract authority granted to the secretary on [sic] section 603 of the Merchant Marine Act, 1936. (Emphasis added)."

See also U.S. General Accounting Office report PAD-81-27, March 1981, entitled "A Glossary of Terms Used in the Federal Budget Process," p. 42, at the definition of "Contract Authority." Moreover, the term "liquidation" has been used since long before the Maritime Administration announced its proposed "buy-out" guidelines; therefore, "liquidation" has to have had a meaning separate from and independent of "buy-out." Finally, the courts also recognize this meaning of the term. See *National Association of Regional Councils* v. *Costle*, 564 F. 2d 583 (D.C. Cir. 1977), in which the Court summarized the three ways in which the United States may become financially obligated, namely, appropriations, contract authority, and borrowing authority. Regarding contract authority, the Court said: "Contract authority is legislative authorization for an agency to create obligations in advance of an appropriation. It requires a subsequent appropriation or some other source of funds before the obligation incurred may actually be liquidated by the outlay of monies." [*Id.* at 586; emphasis added].

These very brief references to the ODS program clearly restrict ODS appropriations to the ODS program as established by law. The circumstances presented here call for application of the rule that specific reference in an appropriation act to an authorization act will incorporate the authorization provisions by reference. 45 Comp. Gen. 236 (1965).

6. MARAD'S ODS AUTHORIZATIONS

For fiscal years 1982, 1983 and 1984 there were, in fact, no separate Authorization Acts for the Maritime Administration and its programs. The current legislation in both the House and Senate simply authorizes funds: "(1) for payment of obligations incurred for operating-differential subsidy, not to exceed $377,750,000."

H.R. 4706, 98th Cong. 2d Sess. (1985); S. 2499, 98th Cong. 2d Sess. (1984). The annual authorization language similarly restricts ODS authorizations to the ODS program and preclude buy-outs. H. Rep. No. 98-635, 98th Cong. 2d Sess. (1984); S. Rep. No 98-445, 98th Cong. 2d Sess. (1984).

7. MARAD'S ODS PROGRAM LEGISLATION

It is therefore necessary to refer to the Merchant Marine Act of 1936, as amended, to determine if buy-out payments are a permissible use of ODS appropriations. As the following discussion demonstrates, there is no basis whatsoever for such payments.

A. Merchant Marine Act provisions

Section 603(a) of the Merchant Marine Act of 1936 authorizes the Secretary of Transportation to "enter into a contract with the applicant for the payment of an operating-differential subsidy," under the terms specified in the Act. The purpose of the subsidy is to place U.S. operators on a parity with foriegn-flag competition. The subsidy is calculated on the basis of an examination of certain categories of actual costs experienced by U.S.-flag carriers operating in contractually-designated trade routes, as compared with the costs of their foriegn-flag competitors. The subsidy paid is the actual difference between the U.S.-flag and the foreign-flag costs.

Section 606 of the Act (46 U.S.C. 1176) constitutes express authority for DOT to make certain specific changes in ODS contracts, including a "rescission" of a contract. A "rescission" ends an ODS contract without attendant financial obligation on the part of the Government, whereas the proposed "buy-outs" would involve financial commitments by the United States. Similarly, a "modification" would apply to a particular service in a contract involving several services and would allow a contractor to withdraw from that service, but again, with no financial commitment from the United States. Section 606 categorically states that ODS "shall cease."

Section 606 eliminates the possibility of implied authority to enter into "buy-out" agreements. See also 31 U.S.C. § 1301(d). In 1936, Congress clearly and deliberately set forth a means for ending ODS contracts early. The method chosen does not permit the obligation of unearned ODS funds in conjunction with early terminations.

While other clauses of section 606 relate to reductions in payments and changes in essential services, the fourth clause of section 606 refers specifically to the only conditions under which a contractor may withdraw from an ODS contract, upon which the payments thereunder are to cease: "(4) that if at any time the contractor receiving an operating-differential subsidy claims that he cannot maintain and operate his vessels in such an essential service, with a reasonable profit upon his investment, and applies to the Secretary of Transportation for a modification or rescission of his contract to maintain such essential service, and the Secretary of Transportation determines that such claim is proved, the Secretary of Transportation shall modify or rescind such contract and permit the contractor to withdraw such vessels from such essential service, and upon the date of such withdrawal the further payment of the operating differential subsidy shall cease and the contractor be discharged from any further obligation under such contract;".

Further, as to the general powers and authority of MarAd under the 1936 Act, section 207 of the Act is relevant: "The Federal Maritime Commission and the Secretary of Transportation may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's and Secretary's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): *Provided*, That it shall be recognized that, because of the business activities authorized by this chapter, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission or Secretary from the provisions of this chapter."

Section 606 of the 1936 Act and 31 U.S.C. § 1301(d) clearly prohibit "buy-outs." The proposed guidelines, as noted above, define an ODS Termination Agreement in a way which requires the "terminated " ODS contractor to undertake certain obligations, such as vessel replacement, maintenance of capacity, provision of service, maintenance of U.S.-flag status for existing and replacement vessels, a first option to the United States to acquire replaced vessels, agreement not to request ODS in the future on penalty of liquidated damages, and liquidated damages for nonperformance of service or new construction requirements. In contrast to the above, that part of Section 606 which relates to "rescission" and "modification" clearly specifies that neither the Government nor the contractor would have any obligations upon the withdrawal of the subsidized vessels from the subsidized service.

B. The Corliss Steam-Engine case

Much of the commentary on MarAd's guidelines revolved around efforts to establish the proposition that a general power to contract implies also the power to mofify or terminate the contract, citing *United States* v. *Corliss Steam-Engine Co.*, 91 U.S. 321 (1875) are the leading case authority. This effort by the proponents of ODS buy-outs is misdirected for two reasons. First, it is unnecessary to search for an implicit authority to terminate ODFS contracts because Congress has explicitly provided such authority: principally in section 606 and more recently and to a limited extent in section 614 of the Act, which allows for a temporary withdrawal from subsidized service but without payment of subsidy. Second, *Corliss Steam-Engine* held that where the Secretary of the Navy had power originally to agree to compensation for the entire performance of contracts, "[H]e must be equally authorized to agree upon the compensation for their partial performance." (91 U.S. 321 at 323, emphasis added). There was absolutely no suggestion that the contractor was entitled to payment over and above that which it had actually earned by virtue of its partial performance. Thus, *Corliss Steam-Engine* and its progeny are fully distinguishable from the proposal in question.

C. The Seatrain case

Section 207 of the 1936 Act (46 U.S.C. § 1117) has been asserted by buy-out proponents to support the kind of "termination" of ODS contract proposed by MarAd. The Supreme Court's decision in *Seatrain Shipbuilding Corporation* v. *Shell Oil Company*, 444 U.S. 572 (1980), in part relied on section 207 to find authority to enter into construction differential subsidy re-payment agreements. Contrary to the claims made by those favoring buy-outs, the *Seatrain* treatment of section 207 does not, however, fill the void. There are three critical distinctions. First, *Seatrain* involved repayment of construction-differential subsidy funds to the Government; the Government was not obligating itself for the payment of money. Thus, the above-quoted constitutional provision and various Title 31 sections were not involved; the litigation dealt only with the proper interpretation of the Merchant Marine Act of 1936, in and of itself. Second, the effect of the *Seatrain* decision was to permit the Government, upon repayment of all CDS (with interest), to release a vessel owner permanently from the prohibition against the use of the vessel in the domestic trade. Third, section 207 fails to meet the specificity requirement of 31 U.S.C. § 1301(d), *supra*, p. 2.

8. REPROGRAMMING AND TRANSFER

Some may argue the theory that unused or carry-over ODS funds might either be "transferred" or "reprogrammed" in order to make payments under ODS termination agreements. However, this is not so, as a brief discussion will demonstrate.

A. Reprogramming

First, reprogramming shifts funds between purposes within an appropriation, whereas a transfer shifts funds *between* appropriations. Further, reprogramming is subject to an agreement between an agency and relevant congressional committees, as well as to the terms of statute applicable to that agency.[2] However, reprogramming is permitted only to the extent that the terms of the appropriations act and relevant legislative history make the funds available for the new purpose to which the reprogrammed funds are to be applied. As discussed below, reprogramming cannot authorize "buy-outs." Attached in a 1974 GAO letter to a House Subcommittee Chairman generally describing reprogramming at greater length.

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[2] See, in relation to MarAd, section 509 of H.R. 5712, the FY 85 appropriation bill for MarAd.

In the case of the annual ODS authorization/appropriation process, MarAd identifies a specific ODS "fleet" in its presentation to Congress. Congressional committees review and act upon this so-called "budget justification material," also sometimes called "justification of estimates." The committee consideration of this data is sometimes reflected in the committee reports.[3] Obviously this kind of information forms the basis for the committees' expectations of how the requested funding is to be spent. When significant deviations from the planned applications of the funds are later required, a portion of the funds may be reprogrammed to another purpose, provided that it is one for which the ODS funds are also legally available. If the amount of the reprogramming is significant an advance committee notification is required. MarAd has informally advised that it engages in one or two such reprogramming actions each year.

B. Transfer

A transfer, on the other hand, requires a statutory basis. A transfer may or may not occur in conjunction with organizational realignment.

When an activity or function is transferred within an agency or from one agency to another, general Federal appropriations law permits the balance of an appropriation available and necessary to finance such a function or activity to be transferred to the new organizational unit or agency. However, the transferred funds are to be used "for a purpose for which the appropriation was originally available." 31 U.S.C. § 1531(a).

But in the case of other kinds of transfers, 31 U.S.C. § 1532 provides in part as follows: "An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount. (Emphasis added).

As can be seen, express statutory authorization is required for this kind of transfer, and, if the transferred amount is to be used for some purpose other than as provided for in the original appropriation, there must also be a specific authorization. Informal contact with MarAd produced a representation that MarAd has no transfer authority, and no transfer authority has been located.

9. CONCLUSION

The Constitution, generic Federal appropriations law and the ODS appropriations, authorizations, and program legislation preclude MarAd from obligating money for "buy-outs."

The proposed termination guidelines look not to the continuation of the ODS program authorized by Congress but rather to the substitution of new and ill-defined contractual relationships for those presently in existence under the authority of the Merchant Marine Act of 1936. Thus, a "buy-out" would be really no more than a "grant," under which funds which were appropriated to pay companies for operating under their contracts would be spent to reward them for not operating under their contracts.

ATTACHMENT 2—MEMORANDUM: UNITED STATES LINES, INC. ODS CONTRACT AMENDMENT

On June 2, 1982, the Maritime Subsidy Board/Maritime Administration granted the application of United States Lines, Inc. ("U.S.L.") for an amendment to its 20 year ODS contract on transatlantic and transpacific trade routes (MA/MSB-483) to award a subsidy on those trade routes for five years and thereafter to terminate the subsidy contract on June 29, 1987.[1]

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[3] See S. Rep. No. 98-445, 98th Cong., 2d Sess. (1984), on S. 2499, the maritime appropriation authorization act for 1985.

[1] The arrangement left unaffected U.S.L.'s subsidy rights and obligations on TR 16 (U.S. Atlantic/Australia—New Zealand) acquired from Farrell Lines, Inc. which terminate at the end of 1995 or U.S.L.'s subsidy rights and obligations on TR's 1 and 15A (U.S. Atlantic/South and East Africa) acquired with the purchase of Moore McCormack Lines, Inc. which terminate at the end of 1994.

Salient features of the agreement follow:

1. Obligations of the United States:

a. The U.S. will pay U.S.L. ODS as actually earned up to a maximum of $165 million over five years, with agreed-to annual maximum ODS payments which in no event will exceed what U.S.L. would have earned if the normal ODS formula were applied.

b. ODS payments will remain limited to the maximum number of authorized vessels and voyages.

2. Obligations of U.S.L.:

a. U.S.L. will build 14 Jumbo Econships (following a specified schedule) in foreign shipyards for U.S.-flag documentation.

b. The Jumbo Econships will be operated unsubsidized during the five year term of the ODS contract on U.S.L.'s existing services and its Round-the-World service up to established maximum sailings.

c. The construction of the 14 Jumbos will satisfy U.S.L.'s contractual vessel replacement obligations.

d. During the five year early termination period, U.S.L. will remain in compliance with the substantive and procedural requirements of the Merchant Marine Act and the operational restraints of its ODS contract.

In short, the completion of the vessel construction program will coincide with the early termination of U.S.L.'s subsidized transatlantic and transpacific operations. Thereafter, U.S.L. will operate unsubsidized in the transatlantic/transpacific trades and/or Round-the-World with the (technically ODS-eligible) Jumbo Econships and/or other ODS-eligible vessels in its fleet. The new ODS contract will ultimately save the U.S. Government (taxpayers) hundreds of millions of dollars.

MEMORANDUM—DELTA STEAMSHIP LINES, INC. ODS CONTRACT BUY OUT

On August 15, 1983, Delta Steamship Lines, Inc. ("Delta") submitted a one and one-half page letter requesting the Maritime Subsidy Board to negotiate the terms of a settlement and termination of Delta's two ODS contracts (MA/MSB-353 and 425) which are presently set to run until 1995 and 1997, respectively. The request is pending.

Delta did not present a specific buy-out proposal. What it did present was the totally arbitrary and unjustified cost to the U.S. Government of relieving Delta of its ODS contractual obligations—to wit: $525 million in six payments over five years!

Delata emphasized in the proceeding that the $525 million which it would be paid was not ODS but was rather a settlement. Consequently, Delta would not be earning ODS during the five year period. Indeed, the contracts would be terminated upon the execution of the agreement.

The following summarizes the anticipated benefits to Delta and to the U.S. Government:

1. Benefits to Delta:

a. $525 million for which Delta does nothing.

b. Release of the contractual obligations of two ODS contracts, that is, release from all service requirements and vessel replacement in U.S. shipyard obligations.

c. Delta would build ten new, high-technology vessels in foreign shipyards at a zero asset base cost to Delta.

2. Benefits to the Government:

a. None. No consideration would flow to the Government and ultimately to the taxpayer. The Government would pay hundreds of millions of dollars while losing the benefits of a minimum/maximum level of liner service on essential trade routes under the ODS contracts.

b. The purposes and policies of the Merchant Marine Act would not be served.

Assuming that it continues to receive ODS at an annual rate of $65 million (the annual average for Delta over the last three years) for the remaining 12 year terms of its ODS contracts, Delta will receive an additional $780 million. The net present value of this is $402.6 million. The net present value of Delta's $525 million buy-out proposal is $402.9 million. Thus, the $525 million bonus to Delta is actually worth the same to it in net present value terms as the hypothetical $780 million amount it would receive upon continued performance of its ODS contractual obligations.

In reality, the $525 million buy-out is much more valuable to Delta because Delta's ODS earnings can be expected to decrease as its fleet reaches the end of its statutory life and Section 605(b) ODS eligibility and is replaced with more productive/modern vessels. Taking all of these latter factors into account, Manalytics Inc. has calculated that the net present value of the ODS which Delta can realistically expect to be paid under its contracts in the future will be as low as $231.3 million. Clearly, the $402.9 net present value of Delta's buy-out proposal exceeds this value.

MEMORANDUM—LYKES BROS. STEAMSHIP CO., INC. ODS CONTRACT BUY OUT

On October 26, 1983, Lykes Bros. Steamship Co., Inc. ("Lykes") submitted a proposal for the termination of its ODS contract (MA/MSB-451, set to expire in 1998) to Admiral Shear. The matter is pending before the Maritime Subsidy Board.

Under the proposed termination agreement, the Government would pay Lykes $137 million per year for eight years beginning on the year the contract is terminated—for a total buy-out payment of $1.1 billion! Upon termination of its ODS contract, Lykes' contractual service obligations and substantial vessel replacement obligations (38 vessels between 1985 and 1990) would cease. The payments would enable Lykes to build at least nine new vessels in foreign yards and to buy existing foreign-built vessels.

According to Lykes, its proposal would constitute "great savings" to the Government.

In reality, in terms of net present value, the actual dollar cost to the Government of the Lykes proposal exceeds the total cost to the Government of continued performance and payment of ODS under MA/MSB-451.

1. Benefits to Lykes:

a. $1.1 billion payment to Lykes over eight years.

b. Immediate release of ODS operational restraints.

c. Substitution of Lykes' obligation to replace 38 vessels in U.S. shipyards with the freedom and wherewithal to build only nine containerships in foreign yards at no cost to itself.

d. Lykes, which failed to satisfy its ODS contractual minimum sailing requirements during 1981 and 1982, would receive a tremendous financial windfall.

e. Restructuring of Lykes' liner operations using fewer vessels.

2. Benefits to the Government:

a. None. No consideration would flow to the Government or ultimately to the taxpayer. The Government would pay $1.1 billion while losing the benefits of a minimum/maximum level of liner service on essential trade routes under the ODS contract.

b. U.S.-flag service on the Gulf/Far East route would suffer as Lykes abandoned that service.

c. Presently adequate U.S.-flag container capacity in the transatlantic and transpacific trades would face the increased subsidy supported capacity of Lykes' additional restructured service in those trades.

d. The purposes and policy of the Merchant Marine Act would not be served.

Assuming that Lykes continues to receive ODS at an annual rate of $90.9 million (the annual average for Lykes over the last three years) for the remaining 14 year term of its ODS contract, Lykes will receive an additional $1,272.6 million. The net present value of this is $602.5 million. The net present value of Lykes' buy-out proposal is $762 million. Clearly, it will cost the Government more to buy-out the ODS contract as proposed by Lykes than to require that Lykes fulfill its contractual ODS obligations.

For the same reasons stated with regard to Delta, this disparity is understated. Manalytics Inc. has calculated that the net present value of the ODS which Lykes can realistically expect to be paid under its contract in the future will be as low as $592 million. The $762 million net present value of the Lykes buy-out proposal exceeds this value by an even greater amount.

COMPARATIVE ANALYSIS

	Termination payment (total)	Is payment earned? Is it subsidy?	Nature of agreement	Subsidy contract obligations/ operational restraints	Consideration/ benefits to government (taxpayer)
United States Lines, Inc	$165 million over 5 years.	Yes/Yes. Subsidy is earned in accordance with contract and 1936 act.	Contract amendment; early termination.	Bound by ODS contract provisions for 5 years. New vessels built are operated nonsubsidized.	Save millions while U.S.L. performs under ODS contract.
Delta Steamship Lines, Inc	$525 million over 5 years.	No/No. Amount is an arbitrary figure.	Negotiated settlement; buy-out.	Immediate release from all ODS contract operational restraints and obligations.	None. Costs millions and loses performance under contract.
Lykes Bros. Steamship Lines, Inc	$1,096 million over 8 years.	No/No. Amount is an arbitrary figure.	Negotiated settlement; buy-out.	Immediate release from all ODS contract operational restraints and obligations.	None. Costs millions and loses performance under contract.

Senator STEVENS. Thank you very much.

If Senator Inouye has any questions, we will submit them to you. We appreciate your testimony.

Mr. FINNERTY. Thank you very much.

Senator STEVENS. Our next witness is Mr. Jesse Calhoon, president, National Marine Engineer's Beneficial Association.

We are proceeding on a series of votes, and there is a vote on now. It it is agreeable with you, perhaps you could summarize your statement, and we would place your statement in the record in full.

Is that all right?

STATEMENT OF JESSE M. CALHOON, PRESIDENT, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION

Mr. CALHOON. Yes, sir, Mr. Chairman.

Thank you, Mr. Chairman. I am Jesse Calhoon, president of the National Marine Engineers' Beneficial Association, and I am here testifying to oppose the MarAd proposed buyouts.

Mr. Chairman, I just want to make a couple of points to you and submit my statement for the record.

We believe that the ODS buy out, or probably a better phrase, bailout, was proposed by MarAd because MarAd has been unable to come up with a comprehensive maritime program. We think this is probably a substitution for a comprehensive maritime program.

The point I want to make most strongly, Mr. Chairman, as we have had our attorneys do the research on this question, is that it is clear without a question of a doubt in the proceedings of the

1936 act that the Congress was absolutely adamant as to what the purpose of the ODS was, and the record is replete, and in my statement I give a couple of quotes from that record.

Mr. Chairman, we have to remember the 1936 act was enacted after a major maritime scandal, and then Senator Black, who later became Supreme Court Justice Black, conducted extensive investigations and found that under the then contracts, so-called mail contracts in the early 1930's, the money was literally being put in the corporate coffers rather than going for a stated purpose. Some of the corporate coffers happened to be foreign-flag companies, or competitors, because of intertwined ownership. The chairman of that committee was asked on the floor what the intent was, and he said the intent was to put this money to the seamen, that the steamship companies were merely a paying agent.

Now, the Maritime Administration completely disagrees over the policy of that act. We have been in disagreement with the Maritime Administration before this buyout came along. We are looking very seriously at a case in Federal court on another issue of where this money belongs, whether it belongs in the company coffers or whether it belongs to the seamen.

We have subsidized companies that are delinquent in paying items under the subsidy contract. MarAd continues to pay them the subsidy money, but they are not paying their pension, welfare, and vacation contributions. We are looking forward to litigating that in the very near future. We do not think MarAd has a right to pay them because on the floor of the Congress it was said that money will only be turned over to the steamship companies after they show receipts that the money has been paid to the seamen. And that was the purpose that the auditors were put in the MarAd and were constantly auditing the books of the subsidized lines.

We want to make this point as strong as we can—that money was appropriated by the Congress to benefit the seamen and not to profit the steamship companies.

We have offered a couple of alternatives for the use of the money. We do have no objection to the contract amendments as MarAd worked out with U.S. Lines. We think that was a proper function, and the money is providing a more viable, a more competitive fleet, and as far as the American labor is concerned, more jobs.

That was a well-thought-out innovative program, and we support that and any similar action.

Now, we also recognize that there is an obligation on the Government because they have made these subsidized companies, or forced these subsidized companies into building fuel inefficient, technologically obsolete, and uncompetitive ships over the past 20 years. We do think there is some obligation on the Federal Government to correct some of the mistakes that they have fostered on this industry in the past. That was the reason I submitted the dieselization program. I do not want to cover some testimony I covered before this committee yesterday, but the gas-guzzling steam turbines are in there because of Government policy. The small, fast ships are there because of Government policy.

And some of these relatively new ships that are obsolete are really akin to trying to deliver produce on the superhighway system from southern Florida to New England in a pickup truck. It just will not work, and they cannot compete.

Now, they are great ships for other legitimate Government purposes, but they are not ships that can go out in the economic world and compete. So I do think the Government has some responsibility there.

That concludes the points I wanted to make, Mr. Chairman.

Senator INOUYE [presiding]. Mr. Calhoon, I am sorry I was not here at the beginning of your testimony. I gather that yesterday your testimony was most enlightening concerning the need for low-speed diesels, and is it your view that our shipyards do not have the capability to construct these low-speed diesels?

Mr. CALHOON. Yes, it is. My view is they do not have the capability.

Senator INOUYE. What about reengining?

Mr. CALHOON. On the reengining, Mr. Chairman, American Presidents Lines built three ships recently, and they put into those ships a Sulzer-designed engine, Sulzer of Switzerland designed engine, and an arrangement was made through Sulzer and International Harvester up in Minnesota or Wisconsin that one-half of the parts of the engine could be built foreign and one-half had to be built here. My understanding is that some of the milling machinery we do not have equipment that large in this country. The crank shafts and the pouring of the cylinders was done overseas and the other parts were built here. Something like that can work so that the American manufacturers get some business out of it, at least that which they can handle. The ones that they cannot handle we obviously have to import.

All of our major slow-speed diesel, marine diesel manufacturers were put out of business by a MarAd edict of 1944–45. They no longer exist. Sun Dockyard is gone, Hamilton Engine Works of Hamilton, OH, Nordberg Engine Works of Milwaukee, WI, are all gone, Mr. Chairman.

Now, I have talked to the foreign diesel manufacturers. I speak to them quite frequently. And they tell me they could put a fabricating plant in the United States to build the engines, but they would have to see a market of at least 16 engines a year to make it cost effective. How quickly they could put that plant together, I am not sure.

Senator INOUYE. You are opposed to the use of surplus ODS funds for ODS buy outs, Is that correct?

Mr. CALHOON. Yes, sir.

Senator INOUYE. What is your position on the Crowley-Delta application?

Mr. CALHOON. I was opposed and still am opposed to the proposal that was submitted to the Maritime Administration. I spoke out vigorously, I wrote letters, I protested it. If the Crowley proposal was amended or resubmitted along the lines of the U.S. Lines proposal, then I would wholeheartedly support it.

Senator INOUYE. What is your position on the use of the ODS surplus funds for reengining?

Mr. CALHOON. Mr. Chairman, we are certainly in favor of that. As I understand the workings of the Federal Government, that that money is not really ODS funds now, it is unused moneys residing in MarAd and will have to be returned to the Treasury or used for some promotional program or some program under MarAd's authority. So it is not a question of whether we would like it to be used and out of which pocket. It does not matter to me which pocket it comes from. The reengining program I think is an absolute necessity.

My understanding is that money will revert back to Treasury if MarAd does not use it, or the next year's appropriation will be reduced by an offsetting amount.

So yes, we do support it.

Senator INOUYE. Do you believe that reengining is within the original intent of the Congress when it began the ODS program?

Mr. CALHOON. No, I do not. I think it was an original intent of the Merchant Marine Act of 1936, but I think it is under a different title.

Senator INOUYE. Is labor uniformly opposed to the ODS buy out?

Mr. CALHOON. Mr. Chairman, if maritime labor ever got uniform, I would have a heart attack.

Senator INOUYE. Some have suggested that the ODS funds be placed in a special Department of Labor fund to be paid directly to seamen.

What are your thoughts on that, sir?

Mr. CALHOON. I think that suggestion emanated from me, Mr. Chairman, and what I could envision was if you are going to terminate the ODS contracts, why not put the money over to the Department of Labor and then have true competition. You pay the shipowner, if you are appropriating roughly $400 million a year in ODS, you have got about 500 American ships that could get almost a million dollars a year each if they operated. We do know we have some nonsubsidized operators, would become much more competitive if that happened.

I thought it would equal out some of the lumps and valleys in the maritime program.

Senator INOUYE. And I gather, when I walked in you were saying that you were in favor of the use of the surplus ODS funds for the health care of seamen.

Mr. CALHOON. No, sir, I did not address that.

Senator INOUYE. Are you in favor of using it for pension funds?

Mr. CALHOON. Well, again, you will not find maritime labor together on that.

Mr. Chairman, I would not oppose that. I would not oppose it. But as far as our union is concerned, in MEBA we have our pension plan in very good shape. Over the years we have paid particular attention; we have done very well with our investments, and we hope to have our pension fund totally funded before the expiration of our current contract.

Senator INOUYE. Well, Mr. Calhoon, I thank you very much. You have been extremely helpful, sir.

Mr. CALHOON. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF JESSE M. CALHOON, PRESIDENT, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION

Mr. Chairman, thank you for this opportunity to testify before the Subcommittee on the question of ODS funding. My remarks will focus principally on the proposed MarAd ODS buy-out guidelines and some possible alternatives.

The National Marine Engineers' Beneficial Association opposes the so-called ODS buy-out scheme in the strongest possible terms. It mangles the intent of the Merchant Marine Act of 1936, and, unless substantially altered, it will result in a far smaller merchant fleet than we have today.

Mr. Chairman, I believe we should examine the ODS buy-out scheme for what it is—a cosmetic attempt on the part of MarAd to cover up its inability to come up with a comprehensive maritime program. We have been told of the great benefits of the ODS buy-out plan. That is bunk. It is bad for the long term health of the U.S.-flag fleet, and it pulls the rug out from under American seagoing labor.

To begin with Mr. Chairman, I seriously question whether MarAd has the authority to terminate the ODS contracts that Congress created. These ill-considered guidelines would not only wipe out a carefully devised legislative program that took years to create, but could set a dangerous precedent for wholesale executive branch raids upon legislative powers.

I am the first to admit that there have been problems with the ODS program. Regardless of the reasons for these failures, it is clearly not the function of MarAd to repeal a legislative program and substitute one of its own. If MarAd is so enamoured of its buy-outs or bailouts, then it should follow the proper course of action: submit the proposal to Congress so that its merits or faults can be given full consideration by our elected officials.

The Marine Engineers are appalled that MarAd has totally disregarded American labor in its ODS buy-out guidelines. With the possible exception of MarAd, I think everyone familiar with the 1936 Act knows that Congress intended for American seamen to be the prime beneficiary of the ODS program. The stated purpose of the 1936 Merchant Marine Act was to foster a strong and viable American merchant marine manned by American seamen. To induce American citizens to enter the undeniably hard life of a seamen, Congress sought to improve the wages and working conditions of seamen by imposing on operators minimum manning and wage requirements and certain standards regarding the treatment of officers and crew. In recognition that these minimum standards would increase the financial burden on operators and could cause them to become less competitive because foreign operators were not subject to similar requirements, Congress provided that such costs would be eligible for ODS. The intent of Congress was that the benefits of the ODS program flow through the seamen; the legislative history reflects that ODS payments were not intended to be a "gift" to the operator.

That American seamen were intended by Congress to be the primary beneficiaries of the ODS program is clearly and repeatedly expressed throughout the legislative history of the 1936 Act. In two of the more explicit statements of that intent, Congress noted:

"The operating subsidy is designed in large part ot repay the difference in cost of labor under American standards as compared with foreign. To make sure that labor actually receives the benefits of the plan, the operating subsidy cannot be paid until satisfactory evidence has been furnished to the Authority that the wages fixed by the Government have been paid to the ships' personnel. That American labor shall share justly in the subsidy has been on the hearts of the committee. The bill provides that the advantage shall be with the men who go down to sea in ships and not be absorbed by the ship owner.

"The amount of this so-called operating subsidy is primarily limited to a repayment of sums of money which he has already disbursed in payment of the American labor employed upon his American ship and for the American materials required in maintenance and operation. This labor and these materials cost more under the American flag than they would have cost under a foreign flag. The repayment or reimbursement to the operator of the excess cost is not, therefore, in any sense of the word a subsidy. It is merely an equalization of his American costs as against the costs of foreign-flag operation. There can be no profits to the ship operator in the repayment to him of these out-of-pocket excess expenses which he has already incurred."

To prevent a recurrence of the widespread fraud and abuse existing under the 1982 Act, Congress imposed numerous restrictions and limitations on the payment of ODS which were designed to ensure that operators received ODS only for those eligible costs which they had actually paid. To this end, Congress even gave MarAd the authority for and the responsibility of enforcing the provisions of the 1936 Act through review of operators' voyage vouchers and annual audits of their books and records.

Clearly, the intent of Congress in establishing the ODS program overrides any desire of MarAd or the operator. The ODS buy-out concept proposed by MarAd would turn the clock back 50 years. It coldly and cruelly abandons the Congressional-mandated concern that government funds provided to shipowners reach American seamen. Under the buyout, enormous amounts of money called "contract settlements" would be paid to the shipowners. And there would be little or no restrictions placed on their use, with the exception of some vague vessel replacement requirements. To be blunt, Mr. Chairman, MarAd appears to have washed its hands of American labor. Nowhere in the guidelines is there one iota of concern for our working men and women and the benefits that were created for them. Nowhere is there one word providing for an active force of seafaring personnel. And nowhere is there one provision that would give labor any input into the so-called "negotiation" process for the buy-outs. MarAd has left American seagoing labor like a foundling at the doorstep of the poorhouse.

I would also like to point out that while MarAd is developing schemes such as this one, the national defense is suffering from a dramatic decrease in active seagoing personnel who are critical as a military auxiliary. Due to an 80 percent reduction of jobs on American ships over the last three decades, the United States will soon be faced with a national security crisis. There are further projected reductions in the fleet as well as reductions in crew sizes due to vessel productivity which can only mean a further erosion of our seagoing manpower base. From all the figures I have seen, there will not be sufficient numbers of qualified American seamen by 1988 to man our naval auxiliary vessels and be available for active duty on combat ships.

It is clear to anyone who will take an objective view that the ODS/CDS program of the 1936 Act, as it has been administered for the last twenty years, is a complete and abject failure. It has forced companies to build ships they didn't need, ships they didn't want, ships wrongly configured for the trade, ships with the wrong speed and the wrong engines. This has been the result of the policies of the U.S. Government.

To correct this situation, MarAd did put forth an ODS contract amendment with U.S. Lines which we supported and would supported more of. We believe in exploring new ways to use ODS funds that will result in more ships for our fleet. We found the contract amendment mechanism, as it applied to the case of U.S. Lines, particularly appealing since it will add twelve modern, competitive vessels to the U.S.-flag fleet. It displays imagination and foresight—not retrenchment and defeatism. It is fully consistent with the intent of the Merchant Marine Act—and I would favor other actions along these guidelines.

In contrast, Mr. Chairman, under MarAd's proposed guidelines, we will not have the same assurances as provided in the contract amendment with U.S. Lines. Instead, hundreds of millions of dollars will be diverted to companies that plan to shrink drastically their fleets while pocketing an enormous windfall.

For this reason, I have suggested to the Maritime Administrator that ODS should be paid directly to American seafaring personnel through a fund established in the Department of Labor. Under this program, U.S.-flag companies would pay directly to labor the same wage package paid to foreign labor by the major foreign-flag competitors. Under my plan, there would be no need for a buy-not since management could be released from ODS obligations in exchange for unlimited managerial and operating flexibility. There would be no need and no justification for a buyout. Furthermore, both sides should materially benefit. They would be able to succeed or fail on their abilities to compete in the open market place. And the proposal could support more ships. The present ODS budget can maintain a subsidized liner fleet of slightly more than 100 active vessels. Under my plan that number of ships could be quadrupled. That would be a result that we all could applaud.

Mr. Chairman, I would like to conclude my statement with the following observation. There are those who have found it convenient to blame maritime labor for the economic plight of the subsidized lines. In an attempt to avoid placing the blame where it clearly belongs (namely with MarAd, the Navy, and with the management of the lines themselves), the inability of these lines to compete in foreign commerce is emphasized. However, before pointing the finger at maritime labor, one should analyze why American subsidized lines are not competitive.

The answer lies, I suggest, not in American-flag wage costs, which are not materially higher than the wage costs of other major maritime nations (such as West Germany, the Scandinavian countries, Belgium and Frnace). The answer lies in the fact that the vessels being operated by these subsidized lines are fuel-inefficient, technologically obsolete, and unproductive. Certainly maritime labor is not responsible for that circumstance. Maritime labor has not asked any of the American subsidized lines to continue to operate gas-guzzling, non-automated, small-capacity vessels having crews of 40 or more, while their competition operates fuel-efficient, automated, large-capacity vessels having crews of approximately 20.

Rather than attempting to obstruct or frustrate the introduction of modern and more productive vessels into the American Merchant Marine, maritime labor has on the whole been fully cooperative with such efforts. We recognize that jobs depend upon crew reductions on all automated vessels. I have proposed enactment of legislation that would bring more fuel-efficient slow-speed diesel propulsion into the United States-flag vessels. I have urged changes in Coast Guard regulations so as to make it easier to transfer modern, technologically advanced vessels from foreign registries to the United States-flag. I have sponsored seminars on new engine technologies. By and large, I have received little encouragement in these efforts from MarAd.

Instead, we see plans, such as this ODS buy-out scheme, which will shrink, not enhance our fleet. And in the face of such plans, I am reluctantly complelled to protest.

I urge rejection of MarAd's ODS buy-out plan.

Mr. Chairman, That concludes my prepared statement. I would be happy to answer any questions the Subcommittee may have.

Senator INOUYE. Our next witness is Mr. Richard W. Kurrus of Kurrus & Dyer, counsel for Coordinated Caribbean Transport, Inc.

Welcome, sir.

STATEMENT OF RICHARD W. KURRUS, COUNSEL, COORDINATED CARIBBEAN TRANSPORT, INC.

Mr. KURRUS. Thank you. Thank you very much for letting me submit these few brief comments.

My name is Richard W. Kurrus. I am a member of the lawfirm of Kurrus & Dyer. Our firm has represented Coordinated Caribbean Transport [CCT] in proceedings before the Maritime Administration, Maritime Subsidy Board [MarAd] concerning the subject of ODS buy-outs.

The concept of so-called ODS buy outs has been pending now before MarAd for approximately 2 years. This is a matter of great importance to CCT. The company has spent a considerable amount of money and gone to great effort to present its views on the ODS buy-out concept to MarAd with little evidence that these arguments have been considered.

I have a rather lengthy statement to submit, and I would request that it be made a part of the record.

Our position on ODS buy outs, especially on the two issues of the enabling statutory authority of the Agency and on the merits of the ODS buy-out concept, is identical to that of Sea-Land, so I see no point in repeating in different language arguments that have already been made very effectively by Mr. Finnerty.

As the operator of unsubsidized U.S. flag vessels which compete with vessels receiving operating subsidies from the Government, CCT has a direct and real interest in any ODS buy-out program. Since the ODS buy-out concept first surfaced at MarAd approximately 2 years ago, CCT has been the major opponent of any ODS buy-out scheme that would unjustly enrich the existing operators.

I might say that during this 2-year period there have been various opportunities for parties to file comments concerning the ODS buy-out concept. There have been two proceedings involving the various applications of Delta. There has been an opportunity for parties to comment on the application of Lykes, and, as the general counsel of the Maritime Administration stated, extensive comments were filed in response to MarAd's so-called ODS buy-out guidelines.

During that period MarAd has not made one single finding, nor has it made one single recommendation. At the very outset of the surfacing of the concept, we suggested to MarAd and urged that they decide the legal question first. Now, 2 years later, they have still not decided this legal question, and the general counsel states that they may decide it within the next 60 days. That, in our opinion, is not a reasonable way for an administrative agency to proceed.

With respect to the Delta application, Senator, I heard you state that Delta's latest request was $195 million. I might say that the Delta application has been a moving target. Their first request was for a buy-out payment of $762 million. They later reduced that to $575 million, and their counsel was quoted in an article in the Washington Post in September of 1983 that that was their rock bottom figure. They later reduced it to $525 million, and I now understand that they may have reduced it still further.

With respect to the merits of the Delta application, it should be noted that Crowley bought Delta from Holiday Inns in 1982 for $95 million. At that time, Delta had $90 million in its capital construction fund, which Crowley acquired. They also had a fleet of 24 vessels and various other assets.

As I say, rather than repeat arguments that have already been effectively made by Mr. Finnerty, I would just like to say in conclusion that the implementation of the proposed ODS buy-out scheme as set forth in MarAd's proposed guidelines and as embodied in the ODS buy-out applications of Delta and Lykes would involve the repeal of a carefully enacted legislative program, and the substitution in place thereof of an ill-considered MarAd program. As such, it would involve an unconstitutional usurpation of legislative authority by the executive branch.

MarAd's ODS buy-out program is based upon no economic analysis or any other economic study of any kind, and I might say at this point, Senator, that we in at least I believe five or six requests for information under the Freedom of Information Act, requested all such documents from MarAd. We have never been given any study, any indication that they had an economic impact study or any kind of other economic analysis, and I would be surprised to see if they come up with one in response to your request.

Congress should be especially attentive not to permit this unlawful usurpation of legislative powers through a process of perceived inaction or through some indirect statements upon which MarAd might proceed to implement its improvident program. If there were any merit to MarAd's ODS buy-out scheme, it should be presented to Congress in the normal way, as a legislative proposal upon which hearings can be held and to which responsible economic studies and expert testimony can be addressed.

That is our normal legislative process. Certainly the repeal of our basic maritime regulatory statute, which has been our statute books for almost 50 years, deserves this kind of treatment.

We respectfully urge that this committee make these self-evident precepts concerning our system of Government known to MarAd in whatever way is most appropriate. In addition, we urge that MarAd be instructed that it has no authority to use funds appropriate for the payment of operating differential subsidy for the purpose of effecting an ODS buy-out program of any kind.

Thank you very much.

Senator INOUYE. Thank you very much. I am sorry I was not here to hear the testimony submitted by Mr. Finnerty of Sea-Land, but I gather that your position coincides with that of Sea-Land.

Mr. KURRUS. Yes, particularly with respect to the two basic issues, first, that MarAd has no enabling statutory authority to implement such a program, and second, that the program is very ill-conceived, is not based on any economic analysis, would result in irreparable injury to unsubsidized operators, and would result in unjust enrichment to the recipients of the ODS buy-out payments.

Senator INOUYE. In his testimony, the chief counsel of the Maritime Administration suggested that the United States Lines' termination plan resulted in considerable saving, net savings to the Government.

Would the Delta plan result in savings?

Mr. KURRUS. No. The Delta program certainly would not result in any savings. I might say that we support, as Sea-Land did and as Mr. Calhoon did, the United States Lines type of proposal, of contract amendment, so-called. The Delta plan certainly would not result in any savings to the Government. The chief operating officer and executive vice president of Delta, in a proceeding before the Maritime Administration, Mr. Coller, testified that if MarAd did not approve the ODS buy-out proposal of Delta, Crowley would proceed to dismantle Delta.

If Crowley did indeed do that, the obligation of the Government under its operating differential subsidy Government with Delta would be zero. So there could hardly be any net saving to the Government if they paid $525 million to Delta. It would be a net loss of $525 million to the Government.

Senator INOUYE. Would the Lykes Bros. proposal result in a net savings?

Mr. KURRUS. Certainly not. In the discussion of an amendment to the continuing funding resolution at the end of 1983, it was stated on the floor of the Senate that Lykes is on the "edge of bankruptcy". We have no reason to dispute that. If the Government stays away and does not intrude, it is our opinion that there will be no obligation to pay Lykes subsidy funds in the future.

The amounts that are requested by both Lykes and Delta are preposterous. They bear no relation to what the real exposure of the Government is under these contracts, they bear no reasonable relation to the net worth of the companies. They would be bailouts, as Mr. Calhoon says. They would be windfall profits to the recipients, as Mr. Finnerty has implied.

Senator INOUYE. Should or could surplus ODS funds be used to provide assistance to health care of seamen and pension funds?

Mr. KURRUS. We have no opinion on that. We certainly think that would be a far more appropriate use for the moneys than to give them to private companies who have not shown any great managerial skill to use them and who do not otherwise deserve them.

Senator INOUYE. Should or could these funds be used for reengining?

Mr. KURRUS. I believe that they could, Senator. Certainly the Congress can authorize specifically the use of these unused funds for that purpose. A re-engining program is going to require legislation in any event.

If the legislation is an amendment to the maritime authorization bill, it does seem to me that the problem would be obviated by making it specific that the unused ODS funds could be used for that purpose.

Senator INOUYE. I thank you very much, Mr. Kurrus. You have been most helpful.

[The statement follows:]

STATEMENT OF RICHARD W. KURRUS, COUNSEL FOR COORDINATED CARIBBEAN TRANSPORT

My name is Richard W. Kurrus. I am a partner in the law firm of Kurrus & Dyer. Our firm has represented Coordinated Caribbean Transport, Inc. ("CCT"), the operator of unsubsidized United States-flag vessels in trades between the United States and Central and South America, in proceedings before the Maritime Administration/Maritime Subsidy Board ("MarAd") concerning the subject of ODS buy outs of MarAd.

The concept of so-called ODS buy outs has been pending before MarAd for approximately two years. This is a matter that is of importance to CCT. The company has spent a considerable amount of money and gone to great effort to present its views on the ODS buy-out concept to MarAd—with little evidence that these arguments have been considered. I have a rather lengthy statement to submit, which I request be made a part of the record. At this time, I would like the opportunity to summarize that statement.

As the operator of unsubsidized United States-flag vessels, which compete with vessels receiving operating subsidies from the Government, CCT has a direct and real interest in any ODS buy-out program. Since the ODS buy-out concept first surfaced at MarAd approximately two years ago, CCT has been a major opponent of any ODS buy-out scheme that would unjustly enrich the existing subsidized operators.

Specifically, CCT is opposed to the type of ODS buy-out proposal suggested to MarAd by the Committee of American Steamship Operators (CASO), Delta Lines, Inc. (Delta) and Lykes Bros. Steamship Company (Lykes). This type of ODS buy-out is also embodied in the proposed buy-out guidelines published by MarAd in the Federal Register of October 12, 1983. Under such proposals (Delta and Lykes presently have ODS buy-out proposals still pending before MarAd), the government would buy its way out of the ODS contracts by paying the operator a significant percentage of the subsidy to which the operator would have theoretically been entitled if it had continued to operate its subsidized vessels for the length of the ODS contracts. The sums requested by the subsidized operators are in our opinion preposterous. They bear no reasonable relationship to the real exposure of the Government under the ODS contracts, or to the net worth of the companies. For example, Crowley International, which paid $95 million for Delta in 1982 and acquired a fleet of 24 vessels, $90 million in Delta's Capital Construction Fund and other assets is requesting more than $500 million to be bought out of Delta's ODS contract. This request has actually been reduced from an initial buy-out demand by Crowley of $762 million. Lykes, which has been described on the Senate floor in December 1983 as being on the verge of bankruptcy is demanding $1.1 billion in an ODS buy out.

After the payment of the monetary contract settlement, the subsidized operator would have a sum of money to spend as it might choose. Delta and Lykes have both proposed to use some of the ODS buy-out money to construct new vessels in foreign shipyards.

CCT, which competes with both Delta and Lykes, has contended before MarAd that such ODS buy-out would constitute unjust enrichment to the subsidized operators. It is clear that MarAd is without any legal authority to enter into ODS buy-out arrangements of the type envisioned by Delta and Lykes. A program to dismantle the existing ODS system, involving the payment of substantial monetary contract settlements to subsidized operators, should require the most careful study. Since Congress has created the existing subsidy program, set forth in Title VI of the Merchant Marine Act, Congress should decide whether it should be ended. If ever a matter deserves the collective intelligence that our hearing process is intended to provide, this is such a situation.

The matter of ODS buy outs has had a curious history before MarAd. Since the first ODS buy-out proposal was made to MarAd by Crowley/Delta in July, 1982, there have been extensive hearings on the Delta proposal in two separate proceedings, in one of which detailed evidence was taken directly by the Maritime Subsidy Board itself, chaired by Admiral Shear. Thousands of pages of comments have been filed with MarAd concerning the Delta and Lykes ODS buy-out applications and the MarAd ODS buy-out guidelines. Hundreds of pages of exhibits and testimony were presented to MarAd in connection with the Delta ODS buy-out application, which was the subject of a hearing. Despite this proliferation of comments, evidence and testimony, MarAd had not made one single recommendation on the subject, other than the publication of its proposed guidelines. It has rendered no ruling on its enabling statutory authority, nor has it rendered any decision on any of the other substantive issues involved in ODS buy outs. As far as we are aware, and we have repeatedly sought all available documents from MarAd in four separate requests under the Freedom of Information Act, MarAd has made no economic impact analysis or undertaken any economic study of any kind concerning the many issues and possible consequences that would be involved in an ODS buy-out program.

Immediately after MarAd invited comments on the first Delta ODS buy-out application, we urged MarAd to consider that it has no enabling statutory authority to pursue that course of action and to prepare a legislative proposal if it was determined to proceed with ODS buy outs. We also suggested that as a matter of fair and sensible administrative procedure, MarAd solicit broadly the views of the industry on the issue of its legal authority and on the merits of ODS buy outs. In order to avoid useless time wasting proceedings, we urged that MarAd decide the issue of its statutory authority at the outset. Our suggestion was ignored.

MarAd subsequently initiated a hearing to consider the factual and legal issues involved in the second Crowley/Delta application, as amended (Docket S-725). That proceeding was abruptly terminated without prejudice, after the record had been completed and while motions to dismiss the application filed by CCT and the Board's hearing counsel were pending, because of improper ex parte contacts by Crowley/Delta representatives with the tribunal. After CCT had learned of those improper contacts by Crowley/Delta, CCT requested that MarAd nevertheless proceed to render a decision on the merits of the Crowley/Delta application. CCT pointed out that to terminate the proceeding without prejudice would reward Crowley/Delta, the malfeasor in the improper contacts, by saving it from the consequences of the patently inadequate, flimsy record that it had developed at the hearing. MarAd refused to grant CCT's request thereby keeping the Crowley/Delta proposal alive but at the same time avoiding any decision.

Apart from contravening MarAd's enabling statutory authority, for the Government to make substantial monetary payments with no strings attached to a private company that would use those government payments to compete with another private unsubsidized company would not be consistent with the American system of free enterprise. This unfairness was the subject of testimony of Hector M. Calderon, President of CCT, in MSB Docket S-725 where he commented on the request of Delta for a $525 million ODS buy-out payment as follows: "It is a fundamental precept of [our American free enterprise system] that government competition with private industry should be discouraged and that government assistance to one private company to compete with other private companies should not be permitted. An exception to this principle is the ODS system set forth in the Merchant Marine Act of 1936, but that subsidy program involves statutory and contractual constraints and requirements that, among other things, are designed to protect unsubsidized operators from unfair competition resulting from the payment of subsidy to the subsidized operator. Crowley's proposal contravenes this concept in that it would propose that the government pay to it a sum of $525 million for terminating the Delta ODS contracts but that Crowley itself would have no commitments to the government that are designed to protect against Crowley unfairly competing against or destroying United States-flag operators who do not receive such government largesse."

Docket S-725, Application of Crowley Maritime, Inc., CCT Exhibit 1, p. 7.

If a new program for promoting the American Merchant Marine is to be devised, it obviously should not be limited to making the existing subsidized lines the sole beneficiaries of that program to the exclusion of other American-flag operators and to the exclusion of American maritime labor. There is nothing in the operating records of the existing subsidized lines that evidences that they possess any superior managerial skills. Indeed, just the opposite is true. In most cases, the economic success of these lines has been dismal. MarAd should be taking all possible steps to encourage new, more innovative and creative management within the American Merchant Marine instead of deliberately attempting to discourage such a step—as the proposed ODS buy-out program would do.

In summary, it is CCT's position that:

(1) MarAd has no enabling statutory authority to enter into ODS buy-out commitments of the type envisioned by Lykes or Delta, or as set forth in MarAd proposed ODS buy-out guidelines;

(2) such an ODS buy-out program would be contrary to the legislative intent and the express language of the Act, would involve an usurption of a legislative function, and would be in violation of the separation of powers between the executive and legislative branches as mandated in the Constitution; and

(3) there is no substantive merit in the ODS buy-out concept as set forth in MarAd's proposed guidelines, which are exceedingly vague and largely meaningless and are fraught with procedural deficiencies because, inter alia, they contemplate private *ex parte* negotiations between MarAd and each subsidized line.

CONCLUSION

The implementation of the proposed ODS buy-out scheme as set forth in MarAd's proposed guidelines, and as embodied in the ODS buy-out application of Delta and Lykes, would involve the repeal of a carefully enacted legislative program and the substitution in place thereof of an ill considered program of the agency's. As such, it would involve an unconstitutional usurption of legislative authority by the executive branch. MarAd's ODS buy-out program is based upon no economic impact analysis or any other economic study of any kind. Congress should be especially attentive not to permit this unlawful usurption of legislative powers through a process of perceived inaction or through some indirect statements upon which MarAd might proceed to implement its improvident program. If there were any merit to MarAd's ODS buy-out scheme, it should be presented to Congress in the normal way as a legislative proposal upon which hearings can be held and to which responsible economic studies and expert testimony can be addressed. Certainly the repeal of our basic maritime regulatory statute, which has been on our statute books for almost 50 years, deserves no less. We respectfully urge that this Committee make these self evident precepts concerning our system of government known to MarAd in whatever way is most appropriate. In addition, we urge that MarAd be instructed that is has no authority to use funds appropriated for the payment of operating-differential subsidy for the purpose of effecting an ODS buy-out program of any kind.

Senator **Inouye**. Our final witness is Mr. Talmage E. Simpkins, executive director, AFL–CIO Maritime Committee, representing the National Maritime Union of America.

STATEMENT OF TALMAGE E. SIMPKINS, EXECUTIVE DIRECTOR, AFL-CIO MARITIME COMMITTEE, ON BEHALF OF THE NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Mr. **Simpkins**. Thank you, sir.

Sir, the National Maritime Union is opposed to the Maritime Administration's operating differential subsidy buy-out proposal without complete guarantees that pension liabilities will be met.

It is also our belief that before the unspent or excess ODS funds in the current fiscal year are used for something other than what they were initially intended for or returned to the U.S. Treasury, that every effort should be made to pay up the past service liability generated by the subsidized operators over the years.

As the number of laid up ships continues to grow, the burden to maintain the integrity of various pension plans intensifies. It is a known fact that our maritime industry has been in a state of decline for the past 30 years. During this time, the unions were trying to build adequate pension programs while the employers, concerned about rising expenditures, insisted on keeping the costs down as much as possible.

Past service liability costs, therefore, were often minimized in the belief perhaps that this cost item could be spread over the coming years or into the future. Unfortunately, a number of recent events have transpired which amplify the shortcomings of this decision.

The lack of cargo for U.S.-flag vessels has resulted in an increasing number of laid up ships resulting in a decrease in the number of man-days. Technological changes have led to reductions in manning which in turn reduces man-days. For example, in 1970 U.S.-flag ships carried 25.2 million tons of cargo and provided on the average 36,168 seaman's jobs. In 1981 they carried 34.2 million tons of cargo and employed 18,261 seamen. In 1970 and 1981 the percent of the total U.S. oceanborne commerce carried on U.S.-flag ships was less than 5 percent.

The average age of our merchant seafarer is in excess of 50 years, and this has led to an increase in the number of seamen taking pensions, partially as a result of the two previous points.

In 1969 when the passenger ships were laid up, approximately 5,000 seamen who had been working these ships took their retirement. On top of this, an additional unforeseen cost burden has been placed on the employers with the closing of the U.S. Public Health Service hospitals.

It has been the NMU's position in a number of instances and hearings that the U.S. Government has contributed substantially to the unfunded past service liabilities. Employment or billets in nonwar years ranged from 57,000 in 1937 to 18,261 in 1981. In 1944, the peak year during World War II, there were 168,070 billets, 93,163 in 1951 during the Korean war, and 55,920 in 1967 during the Vietnam war. Starting with World War II, Korea, and Vietnam, much of the unfunded liability was for the Government's account, but the liability for this past service is an ongoing burden for the present dwindling number of employers.

It is our contention that there is a compelling need for a section 606 readjustment in subsidy payments as may be determined to be fair and reasonable and in the public interest with respect to the pension cost issue. This is particularly compelling in light of proposals currently before the administration on subsidy buy out without regard for the accrued pension liabilities.

Thank you, sir.

Senator INOUYE. Thank you very much.

You have testified that you oppose the contract termination proposal submitted by Delta and Lykes; is that correct?

Mr. SIMPKINS. Sir, on the Delta, the National Maritime Union is not on the Delta ships, and they would not have a position specifically on those. But in general, they would be opposed to the ODS buy outs, yes.

Senator INOUYE. Would you be opposed to the type of contract amendment that United States Lines has submitted?

Mr. SIMPKINS. That, as I understand it, was not a total buy out, and at the time we did not—the National Maritime Union did not oppose that.

Senator INOUYE. And for the most part, your position is similar to that of SIU; is that correct?

Mr. SIMPKINS. Yes, sir.

Senator INOUYE. So you are in favor of the use of these funds for health care and pension plans.

Mr. SIMPKINS. Yes, sir.

Senator INOUYE. What about the use of these funds for re-engining?

Mr. SIMPKINS. Well, while it sounds like a very good idea, and I personally do not really know anything about it other than what I have heard here and have read in the paper, but it is our belief that these ODS funds, this title VI of the 1936 act, were intended for the seamen, and that is where we believe they should continue.

Senator INOUYE. Well, I thank you very much, Mr. Simpkins. You have been very helpful, sir.

I wish to thank all of the witnesses and all of the corporate entities and labor organizations that participated in this morning's hearing.

We apologize for the frequent delays, but such is the case in these closing hours of the session.

Thank you very much.

The hearing is adjourned.

[Whereupon, at 12:40 p.m., the subcommittee adjourned subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF W.J. AMOSS, JR., PRESIDENT, LYKES BROS. STEAMSHIP CO., INC.

My name is W. James Amoss, Jr. I am President and Chief Executive Officer of Lykes Bros. Steamship Co., Inc. I have been associated with Lykes since 1947, having worked for the company in various capacities in the U.S. and abroad (1953-1963) until 1973 when I was appointed President. The privilege of presenting to the Committee Lykes' view on the matter of negotiated operating subsidy terminations, or subsidy buy outs in the popular term, is both welcome and appreciated.

A cliche of the American Merchant Marine is that it is an adversary industry. Cannibalistically so, it would seem. Let there be a prospect to help for one; it will be opposed by another, no matter the public benefit. In a sense of growth one may note that this peculiarly American phenomenon has indeed created a flourishing sub industry, the Maritime Law Community of Washington, D.C., the likes of which exists in no other nation. Now, Mr. Chairman, if we can only develop a merchant marine equal in size to its barristers our country would be far and away number one in that category instead of the sixth rank and falling position it holds today.

The first question one should ask about subsidy buy outs is quite simply, why? The answer is the subsidy system today is so costly, so restrictive, so inflexible; in short, so much the product of the national mentality in 1936 that it has in some cases become a constrictor of growth rather than the promoter it was conceived to be, and indeed was, in the period immediately following its enactment. Consider these facts:

(a) Subsidized companies cannot replace their fleet with competitive ships under the Act today. I doubt that statement needs elaboration for this Committee but I will promptly furnish chapter and verse when requested.

(b) The narrow trade route system limiting a subsidized company's scope of operation condemns some companies to service in areas that are by reason of our national strategic policy, the economies of the foreign nations on the trade route, or of foreign political developments, no longer viable U.S. export and import major markets. Southeast Asia, Trade Route 17, represents the most recent of the "busted" trade routes. More to the point, in this country major changes in our domestic transport policy coupled with the development of intermodal transport over the past decade, have wreaked havoc on many trade routes leaving the companies bound to those routes beached in the shallows of market shifts. To elaborate, until recently domestic rail and truck rates were carefully regulated by the Interstate Commerce Commission so as to preserve traditional interior territories, producing and consuming a major portion of our export and import trade, favorable to each of our coastal areas. This long-standing national policy fostered an almost even growth of our merchant marine among the companies centered on the East Coast, the Gulf Coast, and the West Coast. Deregulation of domestic freight rates, a salutary move in principle, has replaced regulated freight rates with the free economics in which volume movements favor the magnetism of high density offered by East Coast ports for Europe, Africa and Mid East trade, and West Coast ports for Asian trade. This can be lamented by those who do not have the flexibility to go where they choose—those operators serving Asia, Europe, Africa and the Mid East trades who are nailed to the timbers of Gulf Coast trade routes by the 1936 Act.

(c) The "Buy American "provisions of the Act have prevented the subsidized operator from shifting to fuel efficient low RPM Diesel propulsion engines that have been the prevailing technology in virtually all post-war built foreign liner vessels. The burden of 20 percent additional fuel consumption between a 1960's era steam turbine engine and the low RPM Diesel engine of that day was bearable when bunker "C" cost $3.00 per barrel or less, which was the case until 1973. Today the cost of a barrel of bunker "C" is $30.00, while improvements in recent years have widened the efficiency of the Diesel engine over the steam engine by more than 35 percent.

(d) Certainly the most compelling reason to negotiate the termination of subsidy contracts is that it is in the public interest. Given the restrictive nature of the Act which determined that the subsidized operator should replace his fleet on a 25 year cycle and the vast technological change since the late 1960's, compounded by the cost of operation of non-automated, highly crewed steam turbine vessels, all of which would continue under the current subsidy system, one must conclude that the option of negotiating a termination of subsidy contracts which would result in immediate fleet renewal programs are in the public interest and our maritime interest.

Besides these facts there are other compelling motives why Congress should determine that Marad has the authority to negotiate the termination of subsidy contracts. The prospects of action from any side of Government to replace the Merchant Marine Act with new legislation that would wash away the progressive arthritic grasp of some subsidy contracts has to be seen as hopeless in the near term. Subsidy termination as an optional alternative, however, would accomplish the rejuvenation of those segments of the industry that are so sincerely restricted.

In response to Marad's request for comments on its Proposed Guidelines for the Consideration of ODS Contract Amendments and Terminations, Lykes submitted Comments on November 18, 1983, over the signatures of our counsel. (See Attachment 1).[1] These Comments fully support the legal authority of Marad in this regard.

As our counsel states, Marad's power to terminate ODS agreements is embraced in the express statutory grant of authority in Title VI of the Act to enter into such agreements; the incidental powers to accomplish this result by contract and to govern its accomplishment are conferred in Title II of the Act. Government contract law has recognized for more than 100 years that the authority to make a contract includes the authority to terminate and settle the contract. See, for example, *G.L. Christian & Assoc.* v. *United States,* 320 F.2d 345, 348–349 (Ct.Cl.), cert. denied, 375 U.S. 954 (1963) where the Court held that a termination regulation was authorized although no express statutory provision gave the procuring agencies authority to terminate their contracts. This principle was recognized and applied by the Supreme Court as early as 1876 in *United States* v. *Corliss Steam-Engine Co.,* 91 U.S. 321.

The rationale for the principle applies with full force to contracts under the Merchant Marine Act, 1936. The purpose, object, and policy of the laws are "to do whatever may be necessary" to develop and encourage the American Merchant Marine. The specific powers and duties delegated to the Secretary to achieve the statute's goals are of the broadest scope. All of these activities entail the exercise by the Secretary of contactual authority; the making of ODS agreements is specifically authorized. While the provisions authorizing the Secretary's activities do not expressly authorize termination of contracts, neither do they expressly authorize their administration and performance. Yet the Board/Marad constantly exercises the implied power to administer and perform such contracts, unhampered by the absence of express authority to do so. Indeed, one of the standard provisions of the ODS agreements is Article II–25: "Cancellation or Modification by Mutual consent. This Agreement may by mutual consent be terminated, modified, amended, or extended with respect to any subsidized vessel(s) or essential service(s) covered by this Agreement."

No one has ever questioned the Secretary's power to include this Article in the agreements.

A recent prominent and controlling authority for the implication of the power to terminate subsidy contracts is the Supreme Court's decision in *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.,* 444 U.S. 572, 585–588 (1980). There in broadest terms the Court stated the Secretary had implied authority to terminate and settle a construction differential subsidy contract, even though the provision there terminated was intended to further a fundamental policy of the Act—that subsidized ships not be operated in the domestic trade. In the absence of express authority, the Court concluded that ". . . the Secretary's broad contracting powers and discretion to administer the Act seem to comprehend the authority . . ."

The U.S. Maritime Commission exercised its general powers to contract and to administer the Act when it supended ODS agreements for all voyages beginning after June 30, 1942. The operators, however, were permitted to continue to deposit the proceeds of sale, loss or requisition of subsidized ships, and earnings from General Agency operations, and to defer income and excess profits taxes—all to enable the operators to be in a strong position to rebuild their fleets after the war. This without a word in the Act authorizing suspension of ODS agreements.

Likewise, in 1936 the Federal Maritime Board terminated and settled the ODS agreement of Pacific Argentine Brazil Line, Inc. two years early, and approved payments to PAB in excess of those otherwise due and payable under the ODS agreement.

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[1] The attachments are in the committee files.

Having the authority to terminate, Marad may do so under Sec. 207 of the Act on terms considered necessary to achieve agreement on termination. Nor is appropriations legislation a condition precedent; Marad's authority is "contract authority," not "payment authority." Marad may enter into contracts obligating funds even though its power to discharge these obligations depends upon annual authorization and appropriation laws. Similarly, the Anti-Deficiency Act does not prohibit the termination agreement because the latter "is authorized by law" and therefore within an express exception of that Act. In a large number of decided cases, the Courts and the Comptroller General have recognized the distinctions between contract authority and payment authority and have enforced the former in the absence of or in excess of appropriations.

Some of our opponents have argued that the cost of the buy-out settlement is excessive. However, in any analysis we have seen, while future buy-out payments and future ODS payments are reduced to net present value, there is no disclosure of the interest rates used in those exercises, nor is there any adjustment of future subsidy payments to reflect an inflationary factor, which Marad has estimated as at least 9% compounded annually. We are confident that Lykes' buy-out proposal results in a very substantial savings to the Government (See Attachment 2); provides Lykes the opportunity to renew its fleet with modern, competitively manned, automated, energy efficient vessels; insure continued service without subsidy; and enrich the strategic resources of the American merchant marine with new vessels. To the extent Lykes' fleet will be reduced from the gross numbers originally contemplated, we, of course, expect the buy-out payments to be commensurately modified, and the uses of these funds to be limited to fleet replacement, debt service and reduction, and expansion in the maritime fields.

It has also been urged in some quarters that Marad should do nothing, in the expectation and hope that some ODS companies would either abandon operations or become financially unable to continue competitive operations. This approach is not only contrary to every word and intent of the Merchant Marine Act, 1936, but also would abandon the American Merchant Marine, the shipping public, sea-going labor, vital national security considerations, and be a total abnegation of stewardship and responsibility by the Administration. Obviously, this cynical argument might obtain more cargo for its proponents, but no one interested in advancement of the American Merchant Marine can fail to see the transparent self-interest involved.

The concerns of labor arise out of a diminishing U.S.-flag fleet of aging and economically noncompetitive ships. Like labor, Lykes also wishes to move forward with new, efficient, competitive ships. In this connection, we applaud those in labor who are willing to reduce manning to foreign levels and to support the acquisition of foreign-built ships. But we cannot agree with the philosophy that ODS was primarily for the benefit of sea-going labor and therefore buy-out payments should be made directly to the unions. The Merchant Marine Act, 1936, guaranteed that labor would be paid a fair wage under decent working conditions. To insure this, Title III authorized Marad to prescribe minimum manning, wages and working conditions, and there has been no reason to utilize this part of the statute in recent years.

In fact, a substantial part of any buy-out payment will go to labor. The termination of subsidy by a contractor with a large fleet of breakbulk vessels, some of which are manned by crews of 42 men, immediately imposes these manning expenses on the operator which will consume the major portion of 3 years of the termination payments until the operator has been able to build and introduce larger automated vessels designed for operation by smaller crews.

It is my firm belief that unless profitable operations are possible—which postulates a new, efficient, competitive fleet of ships—labor will be as much the loser as management. The Lykes proposal is carefuly crafted to result in such a fleet.

Lykes expects to modernize its fleet by contracting for the construction of at least nine vessels within two years after the execution of a subsidy contract termination agreement. Lykes also plans to acquire a number of existing foreign built vessels suitable for use in some services, and may also undertake the reengining and modernization of some of its American built vessels now in the fleet. Having made major investments in fleet replacement vessels, Lykes will be able to provide a vastly improved service for United States oceanborne commerce. Details of our program are set out in our application, Attachment 2.

Finally, while we have co-operated and will continue to cooperate with any committee of the Congress which considers this issue of buy-outs, we believe the appropriate forum for resolution of the issue is the administrative agency charged with responsibility for the maintenance and promotion of the American Merchant Marine. It can use its expertness and long experience to fashion a solution in the best interest of labor, management, the shipping public, and the national defense.

I must observe before concluding that I am dismayed by the constant attacks upon the ODS system by Sea-Land. It would seek to leave the impression that it has never been the beneficiary of Government aid. This has a hollow ring when we consider that (1) Sea-Land expanded its original fleet in the domestic trades under the provisions of Section 510(i) of the Merchant Marine Act. 1936; (2) their subsequent ability to enter into foreign commerce operations was largely the result of a sole source procurement contract with the military which proved to be extremely profitable but nevertheless was exempt from the Renegotiation Act; (3) after the price of bunkers sykrocketed, Sea-Land sold its commercially inefficient SL-7's to the Navy for book value, a sum in excess of $300 million—again, on a sole source procurement contract; (4) during much of its existence Sea-Land was the beneficiary of large infusions of capital and loans from R. J. Reynolds Tobacco Company, its parent, to whom the relationship gave substantial tax advantages.

These events were not denigrated by us then nor are they now on their merits. We believed, at the time, that the public interest was served and the fact that Sea-Land was strengthened was of no concern to Lykes as the record will show. That we raise them now stems from an abiding revulsion that within the American maritime industry it continues to be the practice of some to injure their colleagues whenever legal opportunity presents.

Mr. Chairman, I am grateful for the opportunity to present Lykes' views. I will be pleased to furnish to you and your Committee whatever other information you believe to be helpful.

STATEMENT OF JOHN C. COUCH, EXECUTIVE VICE PRESIDENT AND CHIEF OPERATING OFFICER, MATSON NAVIGATION CO., INC.

Matson Navigation Company, Inc. ("Matson") is a common carrier by water operating, among other routes, an exclusively domestic service between ports of the U.S. Pacific coast and ports of the State of Hawaii. As the operator of an exclusively domestic service, it is entitled to the protection of Section 805(a) of the Merchant Marine Act, 1936 (46 U.S.C. § 1223). That section makes it unlawful for operating-differential subsidy ("ODS") to be paid to any contractor if it or any affiliate is engaged in domestic intercoastal or coastwise service, without the written permission of the Secretary of Transportation. Section 805(a) requires that an application for written permission be filed with the Secretary and that interested persons be given the right to intervene at a hearing. The Secretary is directed not to grant such application if she finds it will result in unfair competition to exclusively domestic operators or prejudice to the objects and policy of the Act.

The protection of this Section is needed by exclusively domestic operators such as Matson who have invested heavily in vessels built without subsidy in domestic shipyards and designed to fit the needs of the offshore trades they serve. During the 15 year period ending December 31, 1983, Matson has invested more than $340 million in vessels and containers used in its U.S. Pacific coast/Hawaii service.

Exclusively domestic operators are vulnerable to unfair competition by ODS contractors and their affiliates who conduct both foreign and domestic operations and have the advantage not only of ODS but also of vessels built either with construction-differential subsidy ("CDS") or in foreign yards.

The proposed ODS contract buyout program would make immense sums of money available to the ODS contractors over a short term buyout period such as five years, rather than over the usual 20 year contract period. The danger of unfair competition to exclusively domestic operators and of prejudice to the objects and policy of the Act is increased accordingly.

There is grave doubt that the Maritime Administration has authority under present law to enter into buyout agreements with ODS contractors. Even if it is determined that MarAd has such authority, however, its exercise should be conditioned on stringent safeguards for the protection of exclusively domestic services. Recipients of ODS buyout payments should be required to invest them in furtherance of their U.S.-flag operations in U.S. foreign commerce, and should be prohibited from directly or indirectly expending them in furtherance of domestic operations. Use of buyout payments to compete in domestic commerce would be grossly unfair to exclusively domestic services and contrary to the objects and policy of the Merchant Marine Act, 1936.

Unless the Maritime Administration determines that it has no authority to enter into buyout agreements with ODS contractors, or takes the position that it will enter into such agreements only if they impose stringent conditions for the protection of exclusively domestic services, there will be a need for remedial legislation. In that circumstance Matson, and no doubt other operators with exclusively domestic services, will ask the Congress to enact legislation prohibiting ODS contract buyout agreements.

Thank you for considering Matson's views.

STATEMENT OF CROWLEY MARITIME CORP.

Crowley Maritime Corporation appreciates the opportunity to comment on the concept of termination of Operating Differential Subsidy agreements—a concept which Crowley fully supports.

The Merchant Marine Act, 1936, declares in part that it is the maritime policy of the United States to maintain a modern, efficient merchant marine owned and operated under the U.S. flag by U.S. citizens, sufficient to carry a substantial portion of the foreign commerce of the United States and capable of serving as a naval and military auxiliary in time of war or national emergency.

The manner in which that still vital policy is being implemented is presently in transition.

The current Administration has announced the termination of Construction Differential Subsidies and is restricting Operating Differential Subsidies to existing contracts. In their place the Administration is seeking independence and flexibility for U.S. flag operators. The early termination of Operating Differential Subsidy contracts will shorten this transition and accelerate the achievement by the existing subsidized lines of independence from Government financial support. It will provide substantial savings to the United States, permit subsidized operators to rebuild their fleets on a sound basis, and help greatly to fulfill the critical need embodied in the Merchant Marine Act, 1936 for a merchant marine responsive to the economic, trade, and national defense needs of this nation.

The concept of terminating a long term Operating Differential Subsidy agreement in return for a lump sum or periodic settlement payment was proposed by Crowley Maritime in connection with its acquisition of Delta Steamship Lines. Delta Lines then, as now, is the holder of two long-term Operating Differential Subsidy agreements providing for the operation of up to 24 vessels in subsidized service between all coasts of the United States and both coasts of South America. Delta's two contracts run until 1995 and 1997. Under these contracts Delta is entitled to receive payment for certain vessel operating costs when its vessels are operated on specific trade routes in the U.S. foreign trade. For the three years 1980 through 1982 Delta received a total of $194.9 million, or an average of almost $65 million annually. Of course, with the current dismal trade picture in Latin America, the number of vessels operating today is substantially lower and therefore Delta's subsidy is less.

Crowley's proposal to terminate Delta's Operating Differential Subsidy contracts is based on the belief that U.S. flag shipping companies can and should be run without the present subsidies, and, under the proper circumstances, can compete in the United States foreign trades. Almost two years have elapsed since the idea of terminating Operating Differential Subsidy contracts in return for periodic payments was advanced by Crowley and very little has occurred since. Although Crowley's proposal remains outstanding and MarAd has sought comments on guidelines for terminating ODS contracts, no action on these issues has occurred.

The intervening two years have, however, demonstrated that America's Merchant Marine policy is at a crossroads. The foreign trade shipping industry in the United States is a mixture of subsidized and unsubsidized carriers competing with varying success and, as often as not, fighting among themselves as to which segment is to receive the benefits of Government programs. The current Administration is advocating a withdrawal of all subsidies from the shipping industry. The Construction Differential Subsidy ("CDS") program was terminated immediately upon this Administration's taking office. The ODS program will not continue except for those few companies whose subsidy contracts remain to run their course. The prior phase of operating and construction differential subsidies available to all who wished to avail themselves of such subsidies appears to be at an end. The future will bring a Merchant Marine sector that must survive on its own.

At the same time, those companies that have Operating Differential Subsidy contracts have the right to receive very substantial future payments from the United States. The total Government liability is enormous. MarAd estimates, provided in connection with recent authorization bills, indicate that MarAd expects to pay approximately $377 million in operating subsidies in fiscal year 1985 to all subsidized carriers. Early termination of this liability can both save the United States money and assist the operators through the transition phase leading to independent operation. The ODS contracts represent a legally binding obligation of the United States. In most instances, these contracts have very substantial periods of time to run before they expire.

Notwithstanding the vast amounts of funds expended on Operating Differential Subsidy over the years, the program has not reversed an alarming decline in this nation's merchant marine. After World War II, the United States had the largest merchant fleet in the world and carried most of the cargo in its foreign trade. By 1981 the United States had fallen to eleventh in number of ships and eighth in tonnage, and carried less than four percent of the cargo moving in its foreign trade. The number of vessels (excluding tankers) under U.S. flag engaged in foreign trade declined from 1,007 in 1948 to about 265 in 1980, and the deadweight tonnage of these vessels decreased from about 10,366,000 tons to 4,864,000 tons. In contrast, in just nine years from 1970 to 1979, U.S. foreign trade almost doubled, going from 473,000,000 tons to 823,000,000 tons. In the 20 years from 1956 to 1976 our foreign trade increased from 260,000,000 tons to 700,000,000 tons. The U.S. foreign trade has become increasingly dependent on foreign flag carriers. The U.S.S.R., whose fleet has grown rapidly, is now second in the world in number of ships and probably first in dry-cargo ships (non-tankers).

In the last six years, three subsidized lines have gone bankrupt, while two others have required substantial assistance from the Maritime Administration to meet current expenses and debt service. At the present time there are only seven subsidized liner operators, and all of them will find it impossible to replace their aging vessels in the absence of the availability of construction subsidy.

The Operating Differential Subsidy program has contributed to this decline. For instance, because vessels operating with the benefit of Operating Differential Subsidy are required to be built in the United States, U.S. vessel operators were forced to construct inefficient steam propulsion plants. This occurred because there were no U.S. manufacturers of large, fuel efficient slow speed diesel engines such as those favored by foreign operators. In addition, the military continued to encourage the employment of steam propulsion in merchant ships long after the economic disadvantage of steam became clear. The use of steam power plants then created a ripple of inefficiency. For example, steam power plants require more men in the crew and officer complement of the vessel and are less susceptible to automation than is the diesel engine. As a result, U.S. operators could not match the fuel efficiency of their foreign flag competition nor achieve the economies that were possible with diesel propulsion.

As we enter the transition phase between a program based on operating and construction differential subsidies, the U.S. flag shipping companies must move away from the deficiencies of the past and prepare to face the increasingly competitive shipping world on their own. U.S. shipping companies will have to modernize their fleets by building diesel propelled vessels that have competitive fuel consumption and efficient manning levels, and they must rebuild their vessels to meet the challenge of containerization which is being felt even where the less developed countries are the destination of U.S. cargoes.

In Crowley's view, the ODS termination proposal has a specific role in this transition phase in the implementation of our national Merchant Marine policy. The termination of Operating Differential Subsidy contracts for a reasonable termination payment accelerates the transition phase and will move subsidized companies into the new environment as quickly as possible. Only after ODS is terminated will we have achieved a truly competitive merchant marine. If ODS contracts are permitted to run their normal course, we will face a period of transition that will last for more than ten years in most cases. As existing subsidized companies run out their Operating Differential Subsidy contracts, hobbled by antiquated restrictions in those contracts, no true test of the policy of independence will occur. Nor will these companies be able to take the steps that will permit them to compete in this new world of independence. Prompt determination of ODS contracts for a reasonable price, on the other hand, wili both hasten the time in which true independence can be achieved and provide some of the wherewithal with which these companies must face the harsh competitive environment that will constitute the shipping business of the 1980s and 1990s.

The next question that one must ask is what should a proper termination program include. In our view, it must include a payment over some relatively short period of time that is a reasonable measure of the longer term asset that the operator has by reason of his long term ODS contract. There are many different methods and formulae for arriving at such a payment amount, but in the end whatever formula is developed must meet the test of reasonableness since no operator will accept the opportunity to terminate his contract unless he believes that the payment he will receive is a relatively fair expression of the value reflected by his Operating Differential Subsidy contract.

The other part of the ODS termination equation revolves around what the Government can expect to obtain from the operator during the period that termination payments are being made. Crowley believes that the operator who receives the proceeds of ODS termination payments should be expected to commit to provide some specified amount of service on certain trade routes in the U.S. foreign commerce for a specific period of time. Furthermore, the operator should be expected to modernize its fleet so that it can put itself in a position to compete effectively against the foreign companies that otherwise will move into the vacuum created by the elimination of U.S. flag shipping companies. There must also be protection against the diversion of monies paid as ODS termination payments to use in the domestic trade. One of the cornerstones of the ODS and CDS programs has been the separation of these benefits from domestic trade operators so as to prevent unfair competition. Finally, we must give some consideration to the fact that the expectations of the pension and welfare funds of seagoing labor were, in part, created by the ODS program. It is, therefore, entirely appropriate that a portion of payments received in connection with the termination of ODS payments be dedicated to the welfare of the seagoing labor force. Whether that takes the form of supplementary payments to pension and welfare funds or funding the establishment of retraining and similar programs may differ from company-to-company and union-to-union. In addition, we would encourage the Government to provide financial assistance to relieve the problem of unfunded pension liabilities and for retraining.

The Delta company has been a long term participant in the Operating Differential Subsidy ("ODS") program and has been one of the dozen principal subsidized carriers in the United States since World War II. Crowley acquired Delta in December of 1982 and has been working diligently to return the carrier to profitability. As part of its commitment to a revitalized Delta Steamship company, Crowley has advanced funds to Delta to enable Delta to commit for the construction of three large, fuel efficient, diesel-propelled containerships now being built in Denmark for operation under the American flag. At delivery, these three ships, together with related equipment, will be valued at a total or more than $150 million. Delivery of the first ship is scheduled for November of this year, and the others will follow shortly thereafter. The new ships will be ideal as naval and military auxiliaries, being able to load and unload without the aid of elaborate shore facilities, designed to accommodate military vehicles and equipment, and able to store extra fuel for long voyages away from fueling stations.

Crowley believes that the Executive Branch has the legal power and authority to carry out a termination program. The ultimate implementation of an ODS termination program, however, may require more than the Executive Branch. I do not mean to suggest that new laws or legislation are a necessary prerequisite for implementation of a termination program. Rather, we believe that the Administration, working in conjunction with the principal committees of the House and Senate, can develop the primary elements of termination programs that would be acceptable to all parties. Having developed these elements the Committees can, through the oversight and consultation process, participate in the development of specific termination programs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
New York, NY, January 5, 1984.

DEAR SENATOR: In my letter of September 12, 1983 I referred to a situation that I termed "The Great American Maritime Windfall". As I had mentioned in my previous letter, the Maritime Subsidy Board of the Maritime Administration had been about to entertain a reapplication from Crowley Matitime International, Inc., the owner of Delta Steamship Lines, for a "but-out" of operational differential subsidies (ODS) amounting to around half a billion taxpayer dollars. I pointed out that such buy-outs were never authorized by Congress, neither directly nor indirectly, and that the Board was going beyond its lawful authority in even considering the application.

Two events have since occurred which have prompted me to write this letter. I believe that you, as a member of Congress, should be aware of these eevents since they affect indirectly all of your constituents. Briefly stated, the first involves some-what irregular rulemaking activity by MarAd and the second the application by Lykes Bros. Steamship Co., Inc. for a "buy-outs" even larger than Delta's.

Before I elaborate on these points, I must set the record straight. You may have heard it claimed that the ILA should not be concerned about these "buy-outs" and for the seamen who will be displaced, because it is not "a maritime union". I am sure that you and your colleagues are aware that the ILA has more active offshore employees in its Masters, Mates and Pilots affiliate and its tugboat locals, than probably any other U.S. maritime union today. Our members serve aboard the very ships that Delta, Lykes and others who will come after them intend to scrap with these "buy-outs".

These "buy-outs" were given increased momentum when, on October 17, 1983, MarAd published in the Federal Register proposed "guidelines" to enable other recipients of ODS payments to enter into so-called "terminiation agreements". In effect, it invited vessel carriers that are unhappy with the largesse that Congress has provided them (in order to assure that certain trading routes will be served by their existing ships and be available in time for a national emergency) to get out of these deals, with a profit to boot! Indeed, MarAd admits right in the body of the proposed guidelines that they are being made under a cloud of questionable legality, which I am sure you will agree, is one of the most unusual declarations ever made by a public agency.

The ILA, along with numerous other parties, raised serious objections to this proposal. The objections were directed first to the legal authority of the agency to issue the guidelines and to enter into the ODS termination agreements. In addition, the ILA also opposed them on the gounds that such action may only be taken after full public adjudicatory hearings and specific fact finding; that they totally ignore Congress' putting a bridle on Title VI payments until its review is completed, objectives are clarified and authorizations are forthcoming; and that the guidelines, even if legally authorized, are too vague and unrestricted for proper implementation.

Taking the cue from MarAd that further buy-out (more aptly "sell-out") applications like Delta's will be considered, Lykes Bros. Steamship Co., Inc. filed its own application with MarAd (under Docket No. S-747). It was published in the Federal Register on November 21, 1983. Though Lykes' proposals and demands do not dwarf Delta's, it demonstrates just how open-ended these buy-outs can become.

Lykes is seeking $1.1 billion (that is, about double that demanded by Delta) to "allow" the government to buy out ODS's for 44 of its vessels which are eligible for subsidies over the next 8 years. Included in its application are all kinds of plans to "maintain or upgrade its services through a fleet modernization program commencing in or about 1986" by delivering up to 6 huge container vessels and 3 container/bulk vessels in its Mediterranean service.

What Lykes does not state in its aplication, and what its critics have had to enlighten the Board, is that Lykes is not seeking a buy-out, but rather a "bail-out". Senator J. Bennett Johnston of Louisiana recently advised from the Senate floor that Lykes is "on the edge of bankruptcy having lost $21,000,000.00 last year". It further appears the Lykes has not even made its minimum sailings in any of the last five years on the prescribed trade routes, nor is it likely that it would be able to make its annual ODS-required sailings in the future with the obsolete, inefficient vessels that comprise its fleet. If that should prove to be the case, then the government's prospective liability to Lykes would not be the $3.5 to $4.5 billion, which it projects in its application of October 26, 1983 as the sum which it would apply for in the future under the ODS program. Rather, MarAd would be able to declare its contract with Lykes to be in default, which would render the U.S. Government's future exposer an absolute nullity. Moreover, it is becoming evident that the existing or already planned levels of U.S. flag container capacity on the routes that Lykes does not plan to abandon under its buy-out proposal, are already adequately serviced by Sea-Land and other estabished domestic carriers.

I trust that you will realize that this in not the type of case to permit to go its full course. It must be nipped in the bud before it gets out of hand. Otherwise, once these applications are approved by MarAd and the present vessels are discontinued, there will be no subsidized carriers left to meet our critical national interests, whether in carrying our own commerce or to satisfy our defense needs. In the meantime, the impact of these actions and proposed actions already are having and will continue to have an unsettling impact upon the thousands of seamen currently benefitting from ODS payments and whose future will be uncertain as long as this matter hangs in limbo.

Once again, I ask each and every one of you to take immediate action to investigate and condemn all this before, not after, the horse is out of the barn. This growing scandal is reaching proportions that you will not be able to long ignore. It will be to your credit to bring the matter up for scrutiny at the earliest possible time. Congress must demonstrate that it does have control over its programs and approriations and is not letting them be abused and distorted for the benefit of a few greedy contractors who are out to take the government for a ride.

I look forward to your comments.

Very truly yours,

Thomas W. Gleason,
International President.

International Longshoremen's Association, AFL-CIO,
New York, NY, September 12, 1983.

U.S. Senate,
Washington, DC.

Dear Senator: I would like to call your attention to a plan which, if successful, may be referred to in years to come as "the great American Maritime Windfall". It involves the siphoning off of a half billion taxpayer dollars to an individual's company who is lulling a government agency into believing that he is doing our country a favor while further reducing the already dwindling U.S. flag fleet and putting scores of trained U.S. seaman out of work. In return he is giving empty short-term promises and visions of things that may never happen. I believe that if you will take the time to investigate further you will agree with me that this plan is not in our country's best interests and must be halted.

By way of background, Delta Steamship Lines ("Delta"), a U.S. flag carrier, operates a fleet comprised of 24 vessels. Sixteen of these are owned by Delta. The remaining eight are under bareboat charters, six of which expire between 1985 and 1987 and probably would be renewed. Each of these vessels is manned by a crew of between 32 and 41 seamen and up to 94 crewmen on each of its four passenger ships.

In 1975 and 1977, Delta, then owned by Holiday Inns, Inc., was awarded two 20-year Operating Differential Subsidies ("ODS's") by the predecessor to the present Maritime Administration. These subsidies were intended by Congress as supplements to U.S. seamen's wages aboard U.S. flag vessels. They have been paid to Delta in a range between $52 and $68 million in the 1979-1982 period. They require Delta to provide cargo service on several trade routes, between the United States and American and African countries, until 1995 and 1997, respectively.

In December, 1982, Crowley Maritime International, Inc. ("CMI" or "Crowley") purchased Delta from Holiday Inns. CMI is a subsidiary of Crowley Maritime Corporation (CMC) whose principal and owner is Joseph Crowley. Crowley owns several tug and barge operations around the country.

In the Fall of 1982, CMI applied to the Maritime Subsidy Board of the Maritime Administration ("the Board") for approval of the transfer of stock. It simultaneously requested leave to terminate the two Delta operating differential subsidy agreements, which have 12-15 years to run. It boldly demanded that, in consideration for the government's release from payment of future such subsidies, it be given outright specified lump-sum payments over a five to six year period.

Initially, Crowley asked the government to pay it $762,000,000.00 for the "privilege" of terminating the ODS contracts. Crowley claimed that the subsidies entailed burdensome regulations and that the "buy-out" payment was not a subsidy but simply a settlement which allegedly would save the government money. Private discussions between Crowley and the agency followed, and Crowley reduced its demand to $575,000,000.00. Crowley then changed its proposal, withdrew its first application, and submitted a new one, this time magnanimously reducing its demand to $525,000,000.00 for the "buy-out."

Crowley is aware that the government has effectively discontinued construction (as distinguished from operational) differential subsidies. Nevertheless, Crowley's proposition is grounded on its plan to scuttle most of the former Delta vessels and to apply $490,000,000 of the proceeds to construct, evidently at foreign shipyards, 10 new dry cargo containership vessels to carry from 1,000 to 1,600 containers each; to reconstruct certain container terminal facilities; and to cover its losses from unsubsidized operations during the transition period. Alternatively, Crowley now proposes that it be paid $360,000,000 to enable it to acquire 5 such containerships and related equipment. In either case, it would use $35,000,000 to euphemistically "ease labor's transition to high productivity ships." This is something that smacks of putting active productive and needed U.S. seamen in mothballs.

The effect of Crowley's amorphous proposal will leave a total of approximately 14 vessels on line. Each of these 10 new ships will be manned by no more than 18 seamen, consisting of 9 unlicensed and 9 licensed personnel (the latter would continue to be represented by the Master, Mates & Pilots Association, an affiliate of our Union).

Crowley has failed to come forward with any meaningful, substantive details to demonstrate that its plan is realistic or actually will materialize. Crowley/Delta has made no studies or analyses to suport its assertions concerning the shortcomings of the Delta fleet. The "buy-out" sum is completely arbitrary.

Thus, there is no firm data or final plan on the proposed number of sailings, the number of vessels to be operated, the level of manning, or the effect on wages and contributions to pension, health, and benefit plans. The only fact that has become clear to date is that Crowley/Delta has constantly changed its proposals before the Board in an effort to win agency approval. Obviously, the indefiniteness of the Crowley plans and commitments and the contradictory representations as to future operations, threaten the maintenance of an adequate U.S. Merchant Marine. They endanger the availability of prospective funds to vessels operating essential trade routes with trained American merchant mariners.

More to the point: even if its proposal should ever be realized, Crowley has asserted that it will not give any guarantee that the Delta fleet would remain under the U.S. flag and using U.S. labor beyond the vessels' statutory lives (around 1998); or that it will maintain certain U.S. flag services on its present routes beyond virtually token five-year period. In any event, it gratuitously offers to provide "minimum service levels" only, between the U.S. and South America and Africa.

You may or may not be aware that these incredible declarations fly in the face of the fundamental rationale for the establishment of the original awards of the ODS's, namely: not to subsidize the construction of new vessels and facilities of questionable necessity or use, but rather to enable existing U.S. flag vessels to compete with their foreign counterparts with the goal of carrying 50% of the cargo on their routes between the United States and its trading partners, using trained and efficient citizen personnel. Indeed, the whole gist of the operating differential is to help committed vessel-owners to compensate the U.S. crews who man their vessels. Yet, Crowley envisions Delta's role exclusively as providing a minimum of service on essential trade routes in the way it—not Congress—deems preferable or best. The MarAd Board's very entertainment and reconsideration of such an application demonstrates its willingness to ignore Congress's purpose and its inclination to make deals beyond its license and power.

Crowley's plan bears no resemblance to or semblance of the essence of the ODS's under the proposed plan. Rather, the effect of Crowley's scheme wil be to convert a multi-million dollar operational subsidy, meant to compensate seamen, into a construction subsidy not provided by law, if, as and when it should deem it opportune to do so. There is no commitment on its part to the long-term advancement of America's interests in its foreign trade or to help remedy the U.S.'s balance of payments problems. None of the lump sum amounts of the payout are broken down to show any relationship whatsoever to the ODS's or to earmark this monumental "grant" for wages, pensions or fringe benefits for the benefit of Delta's employees, not even for severance pay to those whom it intends to terminate.

Indeed, the proposed plan's only certain effect would be to put some 70% of Delta's crewmen out on the sidewalk, at a time when this country is suffering from severe unemployment and even without retraining them for other jobs. This is discernible from a crack in the foundation of this grand plan, exposed in the course of CMI's own original presentation. Despite intellectual analysis raised before the Subsidy Board to demonstrate that its new fleet would be more efficient, Crowley admitted that it cannot control access to or the availability of foreign—or domestic—cargo. It acknowledged the distinct possibility that there could be excess container vessel capacities which would not justify its building of huge container vessels to replace the smaller and more versatile ships it now has, which are covered by the ODS's. This brings to mind the frantic building of oil tankers that, like oil itself, became a glut on the market. Its largest scaled-down alternative seeks relatively more money to build less of these mammoth ships, but it still gives no facts or figures to justify even this option, which again converts ODS's to unauthorized construction subsidies.

I use the term "latest," because there's a bit of recent history to this proposal that you might find interesting.

When public notice of this scheme was given, a number of carriers and maritime labor organization filed strong objections. They questioned whether the Crowley/Delta plan violated the policy of the Merchant Marine Act. The Maritime Administration therefore divided the Crowley application (Docket No. S–725) into two parts, first on Crowley's acquisition of Delta, which was approved, and therefore on the alleged $525,000,000.00 "buy-out."

During the course of the "buy-out" hearings it became increasingly clear that extensive private discussions had been held between Crowley and Department of Transportation officials. While MarAd was considering a motion by its own counsel to dismiss the entire scheme because of inadequate evidence, Crowley again attempted off-the-record contracts with agency's own officials to modify the proposal. This became too much even for the agency officials, who had previously worked to preserve at least an appearance of propriety. Crowley's application was therefore dismissed on March 31, 1983, but with permission to resubmit after 90 days. It did so on August 15, 1983 (under Docket No. S–738).

Accompanying Delta's reapplication is President Thomas B. Crowley's sworn statement in which he confirms "that the application being filed contemporaneously with this affidavit has not been discussed with Government officials in the period since the dismissal of the application in Docket No. S–725 and that Delta will abide by the Administrator/Board Rules of Practice and Procedure and applicable provisions of law."

In other words, Crowley acknowledges the gross irregularity of past dealings with the agency and promises to be a good boy. Nevertheless, this can not and will not eradicate the effects of prior misconduct, neither by the Delta/Crowley consortium nor by or upon MarAd representatives who participated and continue to participate in processing and considering and in making recommendations on the renewed application, resubmitted for its transparent cosmetic impact.

If Crowley is allowed to perpetrate this sham through a proceeding before a bureaucratic sub-agency then it will be "open-season" on ODS's, on the strength and availability of our Merchant Marine and on the U.S. Treasury. Single-deal appropriations of this magnitude must only be made at the highest levels. It is too important and costly to allow bureaucrats to negotiate away without direct congressional oversight and approval.

This is especially the case at a time in our nation's history when governmental budgets and expenses are being closely scrutinized, when new methods of pooling in international trade are being considered and acted upon, and when strenuous efforts are being made to keep hard-working men and women employed. If this presumptuous maneuvering succeeds, then Joe Crowley, already a very rich businessman, will emerge as half-a-billionaire through the unwitting "generosity" of U.S. taxpayers.

I ask you: Is this what Congress intended? Should operating differential subsidies be used to construct foreign vessels rather than operate American made ones? The impact on U.S. Maritime labor will be devastating. The full consequences to national security and U.S. Maritime policy have not been properly assessed. This Crowley/Delta give-away proposal would establish a most dangerous precedent, one that other carriers could readily seize upon to bail themselves out of their commitments whenever times or circumstances make it expedient or profitable.

I submit to you that to remain silent after thus being alerted to the faults, weaknesses and excesses of the proposed transaction is to possibly condone it. I sincerely doubt that you or your colleagues are prepared to stand by while our government and your constituents are being victimized!

I also believe that in an atmosphere of burgeoning budgetary deficits and criticism of the Administration by many factions for multiple restrictions on the funding of social programs, you will be hard pressed to accept the granting of up to a half-billion dollar-plus windfall for an unauthorized endeavor of such doubtful merit. If this unappropriated money is to be spent at all, it would be much better spent to assist those unfortunate people who are in the ranks of the poor and the unemployed.

It seems to me that you, as an elected representative, have an obligation to stop such worthless bureaucratic giveaways. Government, in my opinion, must direct itself toward achieving worthwhile goals or as the framers of our Constitution expressed it, for the common good. I urge you to do your part toward reaching this end by taking appropriate action to foreclose the Maritime Subsidy Board's further consideration of CMI's application, or at the least, to "freeze" its processing until Congress has had an opportunity to fully investigate this highly unusual and unprecedented proposal.

Very truly yours,

THOMAS W. GLEASON,
International President.

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